

Rocha v Tea at Five on Broadway LLC

2025 NY Slip Op 30310(U)

January 23, 2025

Supreme Court, New York County

Docket Number: Index No. 157978/2019

Judge: Shlomo S. Hagler

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

PRESENT: HON. SHLOMO S. HAGLER PART 17

Justice

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MICHAEL ROCHA,

Plaintiff,

- v -

TEA AT FIVE ON BROADWAY LLC,
LOST IN BOSTON MANAGEMENT II INC.,
FELDMAN GOLINKSI REEDY & BEN-ZVI PLLC,
FAYE DUNAWAY, *Individually*,
JOSEPH GUGLIELMO, *Individually*,
MATTHEW LOMBARDO, *Individually*,
BEN FELDMAN, *Individually*,
LESLIE H. BEN-ZVI, *Individually*, and
SCOTT BECK, *Individually*,

Defendants.

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INDEX NO. 157978/2019

MOTION DATE 12/13/2022,
12/12/2022,
01/23/2023

MOTION SEQ. NO. 004 005 006

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 004) 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 204, 206, 207

were read on this motion to/for DISMISS

The following e-filed documents, listed by NYSCEF document number (Motion 005) 173, 174, 175, 176, 202, 203, 205

were read on this motion to/for DISMISS

The following e-filed documents, listed by NYSCEF document number (Motion 006) 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231

were read on this motion to/for DISMISSAL

This lawsuit alleges violations against defendants under the New York City Human Rights Law (Admin Code of City of NY § 8-107 [CHRL]), section 193 of the New York State Labor Law, the “Freelance Isn’t Free Act” (Admin Code of City of NY § 20-927 et seq. [FIFA]), and the New York State Debtor and Creditor Law. More specifically, plaintiff Michael Rocha (Rocha) alleges that defendants discriminated against him because of his sexual orientation, fired him in retaliation for his discrimination complaints, and improperly withheld his final two weeks of salary. In motion sequence number 004, defendant Ben Feldman (Feldman) moves to stay the

case as against him pending a decision by an arbitrator on the arbitrability of the case as against him, or, alternatively, to dismiss the lawsuit as against him and compel arbitration. Rocha cross-moves to stay the arbitration. In motion sequence number 005, defendants Joseph Guglielmo (Guglielmo) and Lost in Boston Management II, LLC (the LIB defendants) move pursuant to CPLR 3211 to dismiss the Second Amended Complaint as against them. In motion sequence number 006, defendants Feldman Golinski Reedy & Ben-Zvi, PLLC (FGRB) and Leslie H. Ben-Zvi (collectively, the Ben-Zvi defendants) move to dismiss the first (discrimination), second (aiding and abetting), third (retaliation), fourth (vicarious liability), and seventh (violations of FIFA) causes of action as against them.¹ This Court consolidates the motions for disposition.

The Parties

The dispute at hand revolves around the decision of the Broadway-bound production “Tea at Five” to terminate Rocha’s job as personal assistant to defendant Faye Dunaway (Dunaway), who at the time was the star of the one-woman show. As such, Rocha worked as an independent contractor or freelance worker for Tea at Five on Broadway LLC (Tea at Five).² Defendant Matthew Lombardo, the playwright, allegedly was “an employee, principal, producer, supervisor, and person with decision-making authority” at Tea at Five (NYSCEF Doc. No. 211 [Second Amended Complaint], ¶ 7). The Second Amended Complaint (the complaint) describes the LIB defendants as the management company and general manager of the production (*id.*, ¶¶ 9-10; *see* ¶ 26 [quoting contract]); and it states that LIB and Tea at Five were plaintiff’s “joint employers” with “the ability and authority to affect the terms and conditions of Plaintiff’s employment up to and including his termination” (*id.*, 13). The complaint alleges that, because

¹ Although labeled a cross-motion, FDRB and Ben-Zvi filed their motion separately, as motion sequence number 006.

² For the purposes of this motion, this Court refers to the play and the LLC as “Tea at Five.”

Guglielmo was the president and sole shareholder of LIB (*id.*, ¶ 11), he also “had the ability and authority to affect the terms and conditions of [Rocha’s] employment up to and including his termination” (*id.*, ¶ 12). It further describes both LIB defendants as agents of Tea at Five (*id.*, ¶ 14).

FGRB was production counsel at Tea at Five. In this capacity, it had responsibilities with respect to “production financing and production-related contracts” (*id.*, ¶ 20). The retainer agreement between FGRB and Tea at Five states that FGRB would “provide all customary production counsel work including, without limitation, rights acquisition, financing . . . and any other related transactional work requested, including the negotiation, memorialization and finalization (including meetings, consultation and advice to you, as requested) of various agreements, subject to the terms of the enclosed memorandum” (NYSCEF Doc. No. 226). According to the complaint, Ben-Zvi was an FGRB “lawyer, partner, principal, and person with decision-making authority at Defendant FGRB” (NYSCEF Doc. No. 211, ¶ 21) who advised Tea at Five on pertinent legal issues. The complaint describes Feldman, who was involved in drafting contracts for the production, as general counsel at FGRB and “an employee, producer, person with decision-making authority, and supervisor of Defendant TEA AT FIVE” (*id.*, ¶ 18). The General Management Agreement specifies the expected services and potential additional services that LIB would provide to the production (*see* NYSCEF Doc. No. 175, ¶¶ 3, 5).

Complaint

During the relevant period, Rocha, who identifies as a gay male, worked for Boston’s pre-Broadway production of the play Tea at Five, receiving approximately \$1,500 per week for his services. Specifically, he worked as a personal assistant to Dunaway in Manhattan and Boston. The complaint states that his job entailed “shopping for [Dunaway], making sure

[Dunaway] took her medication, arranging and managing [Dunaway's] travel schedule and meetings, and accompanying [Dunaway] to and from her rehearsals for TEA AT FIVE located in Manhattan" (NYSCEF Doc. No. 211, ¶ 31). The complaint accuses Dunaway of "regularly and relentlessly [subjecting Rocha] to abusive, demeaning tirades" (*id.*, ¶ 34). Of particular significance, the complaint states that Dunaway "gratuitously and inappropriately [referred] to [Rocha's] sexuality in an attempt to demean and humiliate him while at work" (*id.*, ¶ 35). On May 2, 2019, Dunaway allegedly described Rocha and other employees on the production as "little gay people" (*id.*, ¶ 36) and on May 26, 2019, she called Rocha "a little homosexual boy" (*id.*, ¶ 39).

Rocha informed Feldman of the May 2 incident by text. On May 26, 2019, Rocha complained to Guglielmo about Dunaway's behavior toward him and provided Guglielmo with a recording that backed up his claim about the May 26 conversation. In response to this communication, Guglielmo told Rocha that "[a]ny concerns with Faye's behavior should be sent to [Feldman]" (*id.*, ¶ 42). Although Rocha sent the complaint and the tape to Feldman, Rocha did not receive a response.

Two-and-a-half weeks after the May 26, 2019 communication, on June 12, Tea at Five texted the LIB defendants, directing them to inform Rocha that his services were being terminated, adding that "Faye does not want to work with [Rocha] anymore and their relationship is hurting our work in rehearsal" (*id.*, ¶ 46).³ The LIB defendants promptly complied, essentially telling Rocha that Dunaway was no longer comfortable with their working relationship. The complaint describes these actions as retaliatory, made in response to Rocha's complaints of sexual orientation discrimination, and it states that the proffered excuse was

³ The complaint puts this language in quotation marks but does not contain a citation to the text.

pretextual. According to the complaint, in so doing, the LIB defendants “aided and abetted” the discrimination and retaliation (*id.*, ¶ 49).

Rocha bases his first four causes of action on the alleged discrimination and retaliation. The first cause of action states that defendants violated New York City Administrative Code (CHRL) § 8-107 (1) (a), which deems it a discriminatory practice for an employer or its agent to discharge an individual because of the individual’s “actual or perceived” sexual orientation. The second cause of action states that the individual defendants, including Feldman, Guglielmi and Ben-Zvi, violated CHRL § 8-107 (6), which prohibits individuals from aiding, abetting, inciting, or coercing the discrimination. The third cause of action states that all defendants violated CHRL § 8-107 (7) when they retaliated against Rocha because he complained about Dunaway’s discriminatory conduct. The fourth cause of action argues that the employers, including LIB and FGRB, are vicariously liable for the wrongful acts of the individual defendants.

The additional causes of action relate to the allegation that defendants did not pay Rocha for his last two weeks of employment, for a total of \$3,000. According to the complaint, the LIB defendants and Tea at Five had powers relating to the payment of wages to the production’s employees and independent contractors (NYSCEF Doc. No. 211, ¶¶ 28-29). It also states that, among others, Ben-Zvi refused to pay plaintiff the money unless he signed a general release because Rocha had hired counsel and defendants were concerned about the possibility of this lawsuit (*see id.*, ¶¶ 57-58). The complaint asserts that defendants had no right to withhold payment for work he had already performed (*id.*, ¶ 59).

Rocha received payment with interest sometime before December 2022, and he has withdrawn his prior breach of contract claims (*see* NYSCEF Doc. No. 180 [oral argument transcript, motion sequence numbers 002 and 003], p 46 lines 8-10). However, the complaint

contains three causes of action based on the nonpayment, two of which are relevant here. The fifth cause of action asserts that Guglielmo, Ben-Zvi, and Feldman, among others, violated sections 273, 275, 276, 279, and 280 of the Debtor and Creditor Law when they distributed assets to other creditors to avoid making payments to Rocha. The seventh cause of action asserts that by their failure to timely pay plaintiff the \$3,000 due to him, defendants violated FIFA.

The CHRL

The first cause of action for discrimination relies on the CHRL, which, as relevant here, makes it unlawful “[f]or an employer or an employee or agent thereof, because of [a person’s] actual or perceived . . . sexual orientation . . . (2) [t]o refuse to hire or employ or to bar or to discharge from employment such person.” In addition, a complaint states a prima facie case of discrimination under the CHRL if it alleges that the plaintiff belongs to a protected class, was qualified for the job at issue, and suffered an adverse employment action “under circumstances giving rise to an inference of discrimination” (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 305 [2004]). In these motions, the moving parties dispute that they qualify as employers, joint employers, or agents within the scope of this law.

Debtor and Creditor Law

The pertinent provisions of the New York State Debtor and Creditor Law (DCL) are: DCL § 273 (a) provides that any transfers defendants made to creditors “with actual intent to hinder, delay or defraud any creditor of the debtor” is voidable. Section 275 discusses how to determine when a party makes a transfer and when it incurs an obligation. Section 276 provides that creditors who allege they are defrauded by their debtors by such transfers may seek to avoid the allegedly fraudulent transfers to the extent that this is necessary to satisfy their claims, or to enjoin further transfers, or to levy execution on the transferred assets, among other remedies.

Section 279 states that the laws of the State determine the debtor's location as (1) the individual debtor's principal residence, or (2) the location of the organization debtor's place of business or, if there is more than one location, at the location of its chief executive office. Finally, under DCL § 280, unless otherwise provided, "the principles of law and equity, including the . . . law relating to principal and agent . . ., supplement its provisions."

Standard of Review

"On a CPLR 3211 motion to dismiss, the court will accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Nonnon v City of New York*, 9 NY3d 825, 827 [2007] [internal quotation marks and citation omitted]; see *Wiesen v New York Univ.*, 304 AD2d 459, 460 [1st Dept 2003] [involving age discrimination claim]). Courts grant motions under CPLR 3211 (a) (1) only if the documentary evidence "utterly refute[s] plaintiff's factual allegations" (*Zheng v Centers Urgent Care Mgt., LLC*, 228 AD3d 548, 549 [1st Dept 2024] [internal quotation marks and citation omitted]). The evaluation of a CPLR 3211 (a) (7) motion focuses on the sufficiency of the complaint, "unsupported by proof other than the challenged pleading" (*Holder v Jacob*, 231 AD3d 78, 87 [1st Dept 2024]) – except where, in response to a pre-answer motion, the plaintiff submits affidavits "to remedy defects in the complaint, because the question is whether plaintiffs have a cause of action, not whether they have properly labeled or artfully stated one" (*Chanko v American Broadcasting Cos. Inc.*, 27 NY3d 46, 52 [2016]). Considering these materials, the court determines whether the complaint survives under "any reasonable view of the facts stated" (*id.* [internal quotation marks and citation omitted]).

Motion Sequence 004

Initially, this Court considers Feldman's argument that Rocha cannot sue him in his individual capacity. This includes portions of the first (discrimination), second (aiding and abetting discrimination), third (retaliation), fifth (violations of the DCL), and seventh (violations of FIFA) causes of action. Feldman argues that, under CPLR § 3211 (a) (1), he has proven that he was not Rocha's employer. Instead, Feldman states that FBRB contracted to perform financing and contract-related services for Tea at Five in December 2018, and therefore Tea at Five was not his personal client. Feldman further notes that it was Ben-Zvi, his colleague, who signed the retainer agreement (*see* NYSCEF Doc. No. 181). Although Feldman did sign the Executive Producer Agreement (*see* NYSCEF Doc. No. 182 [Executive Producer Agreement], ¶ 2), he states that he signed this agreement because he took the lead in preparing the offering plan, which related to the Boston Production, and for helping to raise funds for the show. Feldman notes that the agreement explicitly states that Lombardo was the final decision-maker (*e.g., id.*, ¶ 8), and was "not a Manager or principal of the single purpose financing and/or production LLC" (*id.*, ¶ 5).

As for him and his firm's job in general, Feldman defines them as "transactional attorneys," production counsel rather than general counsel (NYSCEF Doc. No. 178, ¶ 8). Feldman states that his work on Tea at Five "consisted solely and exclusively of (a) helping with contracts as aforesaid in my capacity as an attorney, (b) completing the Offering, (c) approaching investors, and, upon request, (d) attending meetings with advertising, press or marketing personnel" (*id.*, ¶ 7). Feldman stresses that paragraph nine of the Executive Producer Agreement states that "[n]othing in this agreement shall be deemed to create a partnership, joint venture, or other similar relationship between us" (NYSCEF Doc. No. 182., ¶ 9). Feldman also contends that

the Executive Producer Agreement related solely to the anticipated Broadway production of Tea at Five; he noted that there were no references to the Boston production other than a statement that he would be provided with travel and lodging to attend the show in Boston.

Feldman points to several other documents that allegedly support his argument. The Independent Contractor Agreement, which he emailed to Rocha at Lombardo's request, describes the terms of Rocha's employment, including his payment, and the proposed signatories were Tea at Five and Rocha. Feldman points out that he was not a party to this agreement and that the agreement did not mention him.⁴ Feldman alleges that the retainer agreement (NYSCEF Doc. No. 181) specifies that he would not be involved with employment matters in any capacity. Feldman also notes that Rocha's Second Amended Complaint describes him not as an employer but as "an employee, producer, person with decision-making authority, and supervisor of [Tea at Five] holding the title of 'General Counsel'" (NYSCEF Doc. No. 211, ¶ 18). Feldman states that the Offering Plan for the play contains the entirety of his obligations, and does not give him any authority with respect to the play's employees (NYSCEF Doc. No. 178, ¶ 66 [relying on NYSCEF Doc. No. 185]).

Based on these documents, Feldman states that he does not fit the definition of an employer. As such, Feldman argues that he cannot be held liable under Administrative Code § 8-107 (7) for discrimination, as the Code applies solely to discrimination by employers. Feldman additionally states that, as he was not Rocha's employer, the third cause of action, which asserts that defendants retaliated against Rocha, must be dismissed as against him. Feldman avers that all allegations that attribute actions and liability to him on this basis are "impermissibly vague

⁴ The arguments regarding the enforceability of the agreement are addressed below.

and conclusory” (NYSCEF Doc. No. 178, ¶ 21 [quoting *Levin v Isayeu*, 27 AD3d 425, 426 [2d Dept 2006] [regarding allegations that corporate veil should be pierced]).

Additionally, Feldman points to *Doe v Bloomberg L.P.*, 36 NY3d 450, 460 [2021], which found that under the CHRL, the agents of a business entity “may incur liability only for their own discriminatory conduct, for aiding and abetting such conduct by others, or for retaliation against such protected conduct.” Feldman contends that the complaint does not allege that his own conduct violated the CHRL in any respect, and that the implication that he “learned of the behavior perpetrated by others, but did nothing” is insufficient to render him liable (NYSCEF Doc. No. 178, ¶ 41). Therefore, Feldman states that he cannot be deemed personally liable.

Rocha opposes this prong of Feldman’s motion. Rocha contends that, contrary to Feldman’s characterization of the complaint, there are allegations that directly implicate Feldman in the decision-making process. Specifically, Rocha cites to paragraph 43 of the complaint, which states that Guglielmo told him, ““Any concerns with Faye’s behavior should be sent to [Feldman]”” (NYSCEF Doc. No. 193 [Plaintiff’s Mem of Law], *5, quoting NYSCEF Doc. No. 211, ¶ 43). Rocha also notes that in his complaint he states that he was fired around two weeks after he sent his complaint to Feldman. Rocha suggests that the temporal proximity raises an issue of fact regarding Feldman’s involvement (*see* NYSCEF Doc. No. 211, ¶¶ 43-46). Rocha adds that his complaint describes Feldman as someone with decision-making and supervisory authority (*id.*, ¶ 18). Rocha argues that, therefore, his complaint sets forth a plausible claim that Feldman was a joint employer for the purposes of the CHRL.

Further, Rocha states that this issue cannot be resolved in the context of a CPLR § 3211 motion (NYSCEF Doc. No. 193, citing *Zuccarini v PVH Corp.*, 2016 NY Slip Op 30350 [U], *6 [Sup Ct, NY County 2016]). Instead, Rocha states, courts consider ““whether there is sufficient

evidence that the defendant had immediate control over the other company's employees," considering, among other things, "commonality of hiring, firing, discipline, pay, insurance, records and supervision" (NYSCEF Doc. No. 193, citing *Jimenez v Concepts of Independence*, 2018 NY Slip Op 30257 [U], [Sup Ct, NY County 2018] [internal quotation marks and citations omitted]). According to Rocha, the individual's characterization of his position is not critical. Collectively, Rocha says, and in the context of a CPLR § 3211 motion, these assertions sufficiently allege that Feldman had the authority of a joint employer.

Rocha argues that the Executive Producer Agreement, which Feldman submitted in support of his motion, only strengthens Rocha's position because it outlines such a broad role for Feldman with respect to the production. Rocha analogizes this case to *Jaclyn S. v Buffalo Bills, Inc.* (44 Misc 3d 1215 [A], 2014 NY Slip Op 51120 [U] [Sup Ct, Erie County 2014]). In its decision, the Erie County Supreme Court denied the team's CPLR § 3211 motion. Notwithstanding *Buffalo Bills, Inc.*'s contention that it merely licensed the right to use its name to the team cheerleading squad, the court deemed resolution of the issue premature prior to joinder of issue and the submission of evidence.

Additionally, Rocha argues that, based on the facts above, the complaint sufficiently alleges that Feldman is liable as a supervisor with decision-making authority. Rocha notes that Feldman has not denied the contention that plaintiff was to send complaints about Dunaway, including those about discrimination, to him. Rocha argues that Feldman's reliance on *Doe v Bloomberg* is misplaced, because, unlike the complaint in *Doe*, the complaint here states that Feldman was personally involved in the alleged discrimination and retaliation. Rocha further points out that under the CHRL, an agent of the employer, or one who aids or incites the

discrimination or retaliation, may be liable (NYSCEF Doc. No. 193, citing CHRL §§ 8-107 [1] [a], 8-107 [6]).

In the instant matter, Feldman has not shown his right to dismissal under CPLR § 3211 (a) (1). First, the documentary evidence is not dispositive where, as here, it conflicts with the complaint's allegations that Feldman had some authority as to his employment status and the handling of employee complaints. As Rocha suggests, the Erie County Supreme Court's decision in *Jaclyn S.* is persuasive authority on the issue of whether Feldman is a joint employer. In their pre-answer motion to dismiss in *Jaclyn S.*, the Buffalo Bills, Inc. relied in part on a licensing agreement between it and the co-defendant Stejon Productions Corporation and the Third Amended and Restated Radio Broadcast Rights Agreement between it and the codefendant Citadel Broadcasting Company to support its position that plaintiff was an independent contractor (*see Jaclyn S. v Buffalo Bills, Inc.*, Index No. 804088/2014, NYSCEF Doc. Nos. 40-42). Even though the documents evinced the movant's intent to license the rights to use the name Buffalo Bills to independent entities, the court found that the plaintiffs had made sufficient allegations to establish issues of fact as to joint ownership.⁵ Similarly, the allegations in Rocha's complaint that relate to Feldman are sufficient to raise an issue as to whether Feldman's responsibilities qualify him as an employer under the CHRL.⁶

⁵ In *Jaclyn S.*, the parties relied on *Zheng v Liberty Apparel Co.* (355 F3d 61, 72 [2d Cir 2003]), which applied a six-factor test to decide whether the defendant was a joint employer of the laborers in the lawsuit. Most relevant here are the following factual questions: (1) whether the business in question could shift from one alleged joint employer to the other, (2) whether responsibility under the contracts could pass from one alleged joint employer to the other without critical changes; (3) the degree to which the alleged joint employer supervised the plaintiff's work; and (6) whether the plaintiff worked exclusively or predominantly for the alleged joint employer.

⁶ For reasons discussed later in this decision, the second cause of action for aiding and abetting discrimination would apply to Feldman even if the court ultimately decides that he is not an

The Executive Producer Agreement upon which Feldman relies does not dispose of the issue. Feldman is correct that, at paragraph 9, Feldman is described as an independent contractor rather than a partner or joint venturer (NYSCEF Doc. No. 182). However, paragraph 2 states that he had the right to “[advise] and assist[] the Producer with respect to the selection of casting, creative and production personnel”; and that, upon request, he would work with the general manager on matters including the “supervision, communication, interaction and liaising with departments and department heads: production management; . . . legal, insurance and banking; theatre owner; unions; . . . author and director and the applicable representatives of the foregoing, or overseeing same if done by a member of the GM office” (*id.*). Thus, the agreement gives Feldman the potential power to participate in hiring decisions, handle the payment of employees, and collaborate with Lombardo in the supervision of the play’s various departments. Feldman’s comment that the agreement does not refer to the Boston production is unpersuasive, as he concededly performed work and received payment during the Boston run.

Finally, Feldman makes various arguments that are premature. For example, Feldman states that, although the complaint alleges that Rocha was directed to send his discrimination complaint to him and that Feldman ignored his complaint, this does not render him liable because he could not engage with Rocha unless Tea at Five provided written approval or affirmatively directed him to do so. Feldman adds that he nonetheless “attempted to do everything I could within the framework of being obligated to act in the interest of [Tea at Five]” (*id.*, ¶ 53) and he details his alleged activities and attempts to reach out to Rocha. The factual allegations in Feldman’s affirmation are irrelevant for the purposes of a CPLR § 3211 (a) (1)

employer (*see Lax v City Univ. of N.Y.*, 2023 NY Slip Op 50922 [U], *16 [Sup Ct, Kings County 2023]).

motion (*see Rosario v Hallen Constr. Co., Inc.*, 214 AD3d 544, 545 [1st Dept 2023]). Similarly, Feldman's allegations that he is an openly gay parent who severed his affiliation with the play on June 19, 2019, and that he was unaware of Tea at Five's decision not to pay Rocha for his last two weeks, are factual statements not pertinent to his motion to dismiss, as are his allegations regarding the actual duties he performed under the agreement.

Next, this Court considers Feldman's application for a stay pending the arbitration of the dispute as it relates to him.⁷ In his motion, Feldman relies on paragraph 8 of the unsigned Engagement of Services Agreement (contract) between Tea at Five and Rocha (NYSCEF Doc. No. 184), which states that "The parties herein agree that any controversy or claim arising out of this Agreement shall be settled by arbitration before a single arbitrator in New York, NY, under New York law, in accordance with the rules then obtaining of JAMS." The JAMS Policy on Employment Arbitration Minimum Standards of Procedural Fairness (JAMS Policy book) states that JAMS "will . . . defer administering the arbitration for a reasonable period of time to allow the contesting party to seek a judicial ruling on the issue. JAMS will comply with that judicial determination" (NYSCEF Doc. No. 201, § C). There is no evidence that JAMS has decided that a reasonable period of time has passed and, pursuant to the same section, resolved the issue of arbitrability.

Feldman's application for a stay is denied. First, as the language in the JAMS policy book states, questions of arbitrability are reserved for the court. Second, even if this were not the case, "the question whether the parties have submitted a particular dispute to arbitration, i.e., the

⁷ This is Feldman's second motion for arbitration (*see* NYSCEF Doc. No. 124). At oral argument on the prior motion on November 2, 2022, this Court held that Feldman had not met his burden of showing that both parties intended to be bound by the unsigned contract (*id.* at 25 lines 7-9). Accordingly, this Court denied the motion without prejudice to renew with evidence that Tea at Five and Rocha intended to be bound by their agreement (*id.* at 24 lines 11-15).

question of arbitrability, is an issue for judicial determination unless the parties clearly and unmistakably provide otherwise” (*Matter of Steyn v CRTV, LLC*, 175 AD3d 1, 10 [1st Dept 2019] [internal quotation marks, citation, and internal brackets omitted]). Specifically, because an arbitration agreement is a contract, “a party cannot be forced to arbitrate a dispute that it did not expressly agree to submit to arbitration” (*id.*). Here, the language in paragraph 8 of the unsigned employment agreement does not state that the matter of arbitrability is arbitrable. Similarly, and especially given the language in the JAMS rules, the reference to JAMS in the proposed agreement does not evidence the intention that an arbitrator decide the issue (*see ALP, Inc. v Moskowitz*, 204 AD3d 454, 456 [1st Dept 2022]).

Next, this Court turns to the prong of Feldman’s motion that seeks to dismiss the lawsuit as against him and to compel arbitration based on the arbitration language in the unsigned Engagement of Services Agreement. The pertinent part of the agreement states:

“Contractor’s remedy shall be limited to his right to recover damages, if any, in an action at law, and may not pursue injunctive or other equitable relief that would . . . damage in any manner the production, financing, performance or other exploitation of the Play or Production. The parties herein agree that any controversy or claim arising out of this Agreement shall be settled by arbitration before a single arbitrator in New York, NY, under New York law, in accordance with the rules then obtaining of JAMS . . .” (NYSCEF Doc. No. 184, ¶ 8).

According to Feldman, every draft of the agreement included this provision, and Lombardo, as managing member of the production, relied on it. Feldman submits Lombardo’s affidavit, which states that Lombardo directed Feldman to draft a contract with a mandatory arbitration clause (NYSCEF Doc. No. 179, ¶ 7). Lombardo explains that such a clause “is almost always a requirement to obtain funding for the production” (*id.*, ¶ 8). Feldman cites to Rocha’s May 12, 2019, email, which states that he “carefully read the contract” and signed it, but that he did not

send it to Feldman because it used the name “DeRocha” rather than his legal name, “Rocha” (NYSCEF Doc. No. 183). Feldman contends that this email “functioned as a signature” because it showed there was a meeting of the minds, and that it also was binding on Rocha because of his representation that he had signed the earlier draft of the agreement (NYSCEF Doc. No. 178, ¶ 108). Feldman states that defendants relied to their detriment on their belief that Rocha signed the agreement.

After Feldman sent the corrected document to Rocha, he informed Lombardo that Rocha had approved the agreement and that Lombardo “would . . . receive a copy soon for countersignature” (NYSCEF Doc. No. 178, ¶ 104). Feldman never received a signed contract from Rocha, and therefore Feldman did not forward any document to Lombardo for countersignature (NYSCEF Doc. No. 180, p 7 lines 6-8). However, Feldman states that Rocha “behaved as though the Independent Contractor Agreement had been completed, reporting to work and accepting monies” (NYSCEF Doc. No. 178, ¶ 106) and that he “never revoked, rescinded or terminated” the contract (NYSCEF Doc. No. 178, ¶ 110) or said whether he signed the corrected document and/or believes it to be enforceable.

Based on the above, Feldman states that CPLR § 7501 applies. That provision states that “a written agreement to submit any controversy . . . to arbitration is enforceable.” Feldman quotes *God’s Battalion of Prayer Pentecostal Church, Inc. v Miele Assoc., LLP* (6 NY3d 371, 373 [2006]) for the proposition that “an arbitration clause in a written agreement is enforceable, even if the agreement is not signed, when it is evident that the parties agreed to be bound by the contract” (NYSCEF Doc. No. 186, *5). Further, although he was not a party to the proposed contract, Feldman states that he reaps the benefit of the arbitration provision because of his status as “a representative hired to provide services representing the principal” (*id.*, *6). In further

support, he points to *Revis v Schwartz* (192 AD3d 127, 142-143 [2d Dept 2020], *affd* 38 NY3d 939 [2022]), in which the Second Department stated that, in certain circumstances, and depending on the relevant state contract law, a non-signatory may be able to enforce an arbitration agreement (NYSCEF Doc. No. 186, *5).

In opposition to the current motion and in support of Rocha's cross-motion to stay the arbitration, Rocha argues that there is no binding commitment to arbitrate. He states that the email in which he indicated that he signed an earlier draft of the agreement is not dispositive because the unsigned agreement supercedes it (NYSCEF Doc. No. 193, *18, citing NYSCEF Doc. No. 184, ¶ 9). He reiterates that Tea at Five also did not sign the agreement and that, at a prior oral argument, its counsel conceded that it waived its right to arbitration (NYSCEF Doc. No. 193, *19, citing NYSCEF Doc. No. 180, at 23 lines 1-5). Rocha additionally argues that counsel's statement that "we did not move [to compel arbitration] because I had filed my motion to dismiss prior to receiving the contract" (NYSCEF Doc. No. 180, p 22 line 24–23, line 1) contradicts the implication in the Lombardo affidavit that Tea at Five intended to be bound by the contract. Rocha also states that an affidavit that Scott Beck (Beck) (lead producer of Tea at Five) filed in opposition to a different motion, in which Beck states that "[i]f Mr. Rocha wants to gamble that he could recover more money through litigation rather than accepting his back salary, it is his privilege to do so . . ." (NYSCEF Doc. No. 200, ¶ 17) shows that Rocha had the right to litigate. Rocha contends that collectively, these factors outweigh Lombardo's allegedly conclusory affidavit in support of Feldman's application and show there was no binding arbitration agreement.

Additionally, Rocha argues that, at any rate, his discrimination claim is an employment issue and thus is outside of the scope of the agreement. He points to an email chain in which

defendant Ben-Zvi writes, in pertinent part, that Rocha’s lawsuit “opened up several issues and possible counterclaims among the parties that must now be researched in detail” and further refers to the litigation (NYSCEF Doc. No. 197, *4 [July 1, 2019, email from Ben-Zvi]), and argues that the email constitutes a concession that litigation is permissible. As Feldman and Ben-Zvi were at the same law firm, Rocha suggests that the alleged concession applies to Feldman as well. As further support of the position that defendants contemplated the possibility of a lawsuit, Rocha points to defendants’ unwillingness to pay him for his last two weeks of work unless he signed a release in which he waived his right to sue. In addition, he argues that the arbitration agreement was coterminous with Rocha’s employment, which was to end on July 14, 2019, but which defendants terminated on June 12, 2019. He also points to language in the “proposed arbitration agreement” that allows him to “pursue ‘an action at law’” (NYSCEF Doc. No. 193, *17, quoting NYSCEF Doc. No. 184, ¶ 8). According to Rocha, the conflict between this provision and the one stating all controversies and claims will be resolved through an arbitration creates an ambiguity that should be resolved against the drafter, Feldman.⁸

Feldman, in reply, states that his prior motion, which sought a stay while an arbitrator determined the issue of arbitrability, was timely, and that at oral argument this Court allowed for the submission of the current motion and discussed the timing of the motion along with “other matters” (NYSCEF Doc. No. 204, ¶ 3). Feldman suggests that this “settled” the issue of

⁸ This Court rejects the position that Feldman’s application is untimely. Rocha is correct that his claims accrued when he was fired (*see Vig v New York Hairspray Co., L.P.*, 93 AD3d 565, 565-566 [1st Dept 2012]) and that the statute of limitations under the CHRL is three years (*Center for Independence of the Disabled v Metropolitan Transp. Auth.*, 184 AD3d 197, 200 [1st Dept 2020]). However, under CPLR § 7503 (a), “[i]f an issue claimed to be arbitrable is involved in an action pending in a court having jurisdiction to hear a motion to compel arbitration, the application *shall be made by motion in that action*” (emphasis supplied). Feldman filed his first motion to compel arbitration on March 26, 2022, a few months before the June 12, 2022, expiration date (NYSCEF Doc. No. 124). Therefore, the court need not consider this issue.

timeliness (*id.*). He states that the arbitration clause clearly applied to disputes over Rocha's treatment while he worked for Dunaway, to challenges to his termination, and to the failure to pay him his wages (*id.*, ¶ 5). He states that the phrase "action at law" in the agreement does not refer to court actions but instead intends to preempt equitable actions.⁹

This Court denies both Feldman's motion and Rocha's cross-motion, except to the extent of severing and dismissing the fifth cause of action alleging violations of the Debtor and Creditor Law. Although courts favor arbitration, they also acknowledge that an arbitration agreement "waives in large part many of [a party's] normal rights under the procedural and substantive law of the State" (*Ferarro v East Coast Dormer, Inc.*, 209 AD3d 717, 717-718 [2d Dept 2022] [internal quotation marks and citation omitted]). Accordingly, courts do not infer a waiver unless there is a clear indication that of the opposing party's intent (*id.* at 718). Further, the party that seeks arbitration must satisfy a "heavy burden" (*Basis Yield Alpha Fund (Master) v Goldman Sachs Group, Inc.*, 115 AD3d 128, 132 [1st Dept 2014]).

At this juncture, there are too many questions of fact as to whether Rocha intended to waive his right to arbitrate. None of the submissions on this issue are dispositive. The fact that no one signed the final copy of the agreement is a critical factor that militates against enforcement. Further, neither Feldman nor Lombardo asserts that they ever attempted to finalize the agreement. Lombardo's affidavit, which states that he directed Feldman to include an arbitration clause in the agreement, is not conclusive because 1) Lombardo did not explain why he did not demand a signed copy of the agreement, and 2) Beck's July 2020 affidavit statement that it was Rocha's "privilege" to "gamble that he could recover more money through litigation rather than

⁹ This Court rejects the argument that only a plaintiff must send a notification of intention to arbitrate (NYSCEF Doc. No. 204, ¶ 2).

accepting his back salary” and signing a general release contradicts Feldman’s position about the stance of the parties to the dispute (NYSCEF Doc. No. 200, ¶ 17).¹⁰ The fact that Rocha worked for Dunaway for the salary described in the agreement is not conclusive, as defendants may have paid him for the value of his work even absent a contract. The language of the arbitration paragraph itself is inconclusive, even if applicable, because of language in the same paragraph that refers to plaintiff’s right to commence an action at law. However, given that Rocha purportedly signed the earlier copy of the contract, that he worked for defendants at the salary in the unsigned contract, and that Feldman and Lombardo indicated that they inferred from this that Rocha had accepted the terms of the contract, including the arbitration provision, Feldman also is not entitled to a permanent stay. Further, as Feldman would not have been a party to the agreement in any case and would not have derived a direct benefit from it, it is unclear whether he can rely on the arbitration provision even if the court ultimately concludes that the agreement is enforceable (*cf. Certain Underwriters at Lloyd’s, London v AT&T, Corp.*, 142 AD3d 921, 921-922 [1st Dept 2016] [a nonparty cannot be compelled to arbitrate if it did not derive a direct benefit from or exploit the contract]). Feldman’s statement that he derived a benefit due to his general status as a representative of Tea at Five is insufficient to satisfy his burden in the context of a CPLR § 3211 motion.

Feldman’s motion and memorandum of law do not assert arguments relating to Rocha’s FIFA claim against him (the seventh cause of action). With respect to the Debtor and Creditor Law claim as against him (the fifth cause of action), Feldman merely argues that the allegations

¹⁰ Although at oral argument this Court stated that an affidavit by Lombardo might be sufficient evidence to warrant judgment, it did not indicate that such an affidavit would conclusively show that there are no issues of fact. Upon its review of the updated materials, it now is clear that a CPLR 3211 motion cannot resolve this issue.

should be arbitrated as they arise out of the same factual allegations as those Rocha asserts based on the human rights laws. However, at oral argument, Rocha conceded that the fifth cause of action under the Debtor and Creditor Law was asserted entirely on information and belief and he consented to the dismissal of the claim. Therefore, this Court grants dismissal of the fifth cause of action and otherwise denies the motion.¹¹

Motion Sequence 005

As is pertinent here, the complaint alleges that during the relevant period, LIB was “general manager for TEA AT FIVE” (NYSCEF Doc. No. 211, ¶ 9), and Guglielmo was “an employee, person with decision-making authority, and supervisor of Defendant TEA AT FIVE holding the title of “General Manager” (*id.*, ¶ 10). In support, plaintiff refers to the contract between Tea at Five and LIB, which designates LIB as general manager (*id.*, ¶ 26). The complaint describes Guglielmo as Rocha’s employer or supervisor, and states that he “was the person who terminated Plaintiff’s employment” (*id.*, ¶ 12). In addition to describing the LIB defendants as Rocha’s employers, it variously refers to them as “joint employers” with and “agents” of Tea at Five (*id.*, ¶ 13-14). As indicated above, the complaint asserts that the LIB defendants fired Rocha directly (*see id.*, ¶¶ 46-49).

In addition, the complaint alleges violations of FIFA and the State Labor Law as against the LIB defendants. Specifically, it notes that, as general manager, the LIB defendants handled the payroll and, as such, paid Rocha his wages under his contract. At the direction of Ben-Zvi, the complaint alleges, the LIB defendants withheld Rocha’s final two paychecks for work that he already had performed. Rocha asserts the first (discrimination), second (aiding and abetting discrimination), third (retaliation), fifth (violations of the DCL) and seventh (violations of FIFA)

¹¹ This Court discusses the fifth cause of action in detail below.

causes of action against Guglielmo, and he asserts the first (discrimination), third (retaliation), fourth (vicarious liability), and seventh (violations of FIFA) causes of action against LIB.

In support of their motion for dismissal, the LIB defendants submit the contract between LIB and Tea at Five (NYSCEF Doc. No. 175). In particular, the LIB defendants point to paragraphs 3, 4, 5, and 12. Paragraph 3 sets forth LIB's obligations under the agreement:

“Preparing estimated budgets of production and operating costs for the Original Production of the Play; negotiating and executing contracts for goods, services, and facilities on behalf of the Producer as may be required for the Original Production of the Play; consulting with and advising Producer with respect to the business affairs of the original Production of the Play; supervising and managing the accounts and financial affairs of the Original Production of the Play; signing federal and local tax returns on Producer's behalf and with Producer's authorization; and rendering such other services as customarily pertain to the position of general manager for a theatrical production in the theatre, in accordance with prevailing industry custom and practice.”

Paragraph 4 provides that LIB would receive \$15,000 from Tea at Five, payable at three junctures. Paragraph 5 outlines the services LIB would provide upon request, for which Tea at Five would make additional payments:

“Services rendered in connection with any videotaping, filming, or televising of the Play, services rendered in negotiating collective bargaining agreements on behalf of Producer with respect to the Play, negotiating or administering the disposition of any subsidiary or touring rights in the Play, furnishing accounting or bookkeeping services for the Play, furnishing booking, engagement management, marketing, advertising, or press services for the Play; furnishing post-closing general management services at any time later than two (2) weeks after the Final Performance and/or furnishing any other services which do not customarily fall within the scope of services customarily furnished by the general manager of a theatrical production in the theatre in the United States.”

Finally, paragraph 12 defines LIB as an independent contractor.

Guglielmo's affidavit (NYSCEF Doc. No. 174) outlines the above paragraphs. Guglielmo asserts that, as the complaint states, he referred Rocha "elsewhere" with Rocha's grievance against Dunaway, allegedly "because LIB had no responsibility or authority to manage or supervise the employees of Tea at Five, LLC" (*id.*, ¶ 10). Although Guglielmo acknowledges that Tea at Five instructed him, as head of LIB, to tell Rocha that Tea at Five was firing him, and that Guglielmo carried out this directive, he contends that "LIB did not make the decision to terminate [Rocha's] services to Tea at Five, LLC, and LIB did not have the authority to supervise, hire, or fire plaintiff" (*id.*, ¶ 12), and that, in his individual capacity, Guglielmo had no role in Tea at Five or any of its business affairs and was never a member, agent, officer or director of Tea at Five (*id.*, ¶ 13). Instead, he suggests that he "simply transmitted the message [to terminate Rocha] as an agent for . . . Tea at Five" (NYSCEF Doc. No. 176 [the LIB defendants' Memorandum of Law], *8).

In their memorandum of law, the LIB defendants note the high threshold defendants must satisfy to prevail on a motion to dismiss. They cite *Doe v Bloomberg L.P.* (36 NY3d 450, 454 [2021] [*Bloomberg*]) and *Cortlandt St. Recovery Corp. v Bonderman* (31 NY3d 30, 38 [2018]) for the standard that when courts review a CPLR § 3211 (a) (7) motion to dismiss a complaint, courts liberally construe the complaint, accept the allegations within it as true, and afford every favorable inference to the plaintiffs (NYSCEF Doc. No. 176, *6). However, the LIB defendants stress that, under CPLR § 3211 (a) (1), if they show documentary evidence that conclusively contradicts the complaint's allegations, those allegations "are not presumed to be true or accorded every favorable inference" (NYSCEF Doc. No. 176, *6, quoting *Morgenthau & Latham v Bank of N.Y. Co.*, 305 AD2d 74, 78 [1st Dept 2003]).

The LIB defendants argue that this Court should dismiss the first cause of action for discrimination because Rocha has not adequately alleged that they are employers, joint employers, or agents of Tea at Five. Relying on *Brankov v Hazzard* (142 AD3d 445, 445-446 [1st Dept 2016]), the LIB defendants state that the “immediate control test” should apply here. Under that test, courts evaluate whether defendant directly controlled the company’s employees, especially the terms and conditions of their jobs. The First Department stressed that “the most important factor is ‘the extent of the employer’s right to control the means and manner of the worker’s performance’” (NYSCEF Doc. No. 176, *7, quoting *Brankov*, 142 AD3d at 446).

Although the complaint refers to the LIB defendants as Rocha’s joint employer along with Tea at Five, the LIB defendants argue that the contention is too conclusory to support a viable claim. They state that the complaint is bereft of allegations that the LIB defendants supervised Rocha or controlled any aspect of his work, that they paid Rocha’s salary or reimbursed him for any expenses, or that they had any control over the decision to terminate him. Although the LIB defendants informed Rocha that Tea at Five terminated his employment, the LIB defendants reiterate that they “transmitted the message as an agent for . . . Tea at Five” (NYSCEF Doc. No. 176, *8). They contend that statements in Rocha’s affidavit lend additional force to their argument, as Rocha repeatedly acknowledges that Tea at Five controlled his work and paid him for his services and that he was told to report any problems to Tea at Five (NYSCEF Doc. No. 176, *12-14, citing NYSCEF Doc. No. 99 [Rocha Affidavit], ¶¶ 15, 17, 22, 23, 26, 28, 29).

The LIB defendants further argue that Rocha has not asserted viable claims against Guglielmo in his individual capacity. They reiterate that Guglielmo merely carried out instructions and that he had no authority to decide whether to terminate Rocha. The LIB

defendants state that Guglielmo was not involved with the play itself or its business affairs. Further, the LIB defendants stress that LIB is a corporation and, as such, Guglielmo is not personally liable for the obligations of the business (*id.*, * 9, citing *Doe v Bloomberg L.P.*, 36 NY3d 450, 461 [2021]). Liability only attaches to an individual if that individual ““abused the privilege of doing business in the corporate form to perpetrate a wrong or injustice against that party such that a court in equity will intervene”” (NYSCEF Doc. No. 176, * 9-10, quoting *Matter of Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d 135, 142 [1993]). The LIB defendants argue that because LIB was “formed for legal purposes and engaged in legitimate business,” and the allegations against Guglielmo in the complaint do not contradict this fact, the court must dismiss the first (discrimination), second (aiding and abetting discrimination), third (retaliation), fifth (violations of DCL), and seventh (violations of FIFA) causes of action as against him.

Next, the LIB defendants seek dismissal of the second cause of action, for aiding and abetting discrimination, as against them. They cite two federal court cases, *Tomka v Seiler Corp.* (66 F3d 1295, 1317 [2d Cir 1995]), and *Robles v Goddard Riverside Community Ctr.* (2009 US Dist LEXIS 51500, *8, 2009 WL 1704627, *2-3 [SD NY 2009]) for the proposition that for liability to attach, the defendants must have participated purposefully in the alleged discriminatory conduct (NYSCEF Doc. No. 176, *13-14).¹² For the reasons they proffer in support of their arguments for dismissal of the first cause of action for discrimination, the LIB defendants contend that Rocha has not demonstrated that they purposely took part in the decision-making process.

¹² This Court notes that the plaintiffs in these cases asserted claims under the New York State Human Rights Law rather than the CHRL.

Additionally, the LIB defendants argue that this Court should dismiss the third cause of action for retaliation under CHRL § 8-107 (7), and the fourth cause of action for vicarious liability under CHRL § 8-107 (13). According to the LIB defendants, there are no allegations in the complaint showing that they personally retaliated against Rocha. Instead, the LIB defendants contend that the complaint's allegations of retaliation point exclusively to Tea at Five and Dunaway's. They cite paragraph 46, which states:

“On or about June 12, 2019, Defendant TEA AT FIVE texted Defendants GUGLIELMO and LIB and asked them to inform Plaintiff that Defendants were terminating Plaintiff's services, further stating ‘Faye does not want to work with [Plaintiff] anymore and their relationship is hurting our work in rehearsal.’” (NYSCEF Doc. No. 211, ¶ 46).

The LIB defendants contend that this statement directly contradicts any claim that they had decision-making authority. They also state that the argument in Rocha's counsel's February 23, 2022 legal memorandum that Guglielmo plotted with Tea at Five and the other defendants to terminate Rocha's employment after Rocha complained of discrimination is purely theoretical and is not reflective of the statements in the complaint (NYSCEF Doc. No. 176, *14, citing NYSCEF Doc. No. 100, *15). Further, they state that this Court must dismiss the third cause of action for retaliation against LIB because of the purported inconsistency between the complaint's allegation that LIB was directly involved in the retaliation and the February 2022 memorandum's suggestion that LIB is vicariously liable for the retaliation.

In addition, the LIB defendants argue that this Court must dismiss the fifth cause of action alleging violations of the Debtor and Creditor Law as against Guglielmo. Under section 273 of the Debtor and Creditor Law, “a transfer by a debtor may be voidable where the creditor's claim arose prior to the transfer, if the debtor made the transfer with the intent to hinder, delay, or defraud any creditor of the debtor” (*Longbride Fin., LLC v Admin Realty, LLC*, 82 Misc. 3d

1115, 1122-1123 [Sup Ct, Queens County 2024]), and section 275 of the law states that “every conveyance made and every obligation incurred without fair consideration when the person making the conveyance or entering into the obligation intends or believes that he will incur debts beyond his ability to pay as they mature, is fraudulent as to both present and future creditors” (Debtor and Creditor Law § 275). In his complaint, Rocha merely alleges that Guglielmo, Lombardo, Feldman, and Beck deliberately transferred Tea at Five’s assets to themselves to avoid paying Rocha the fruits of any judgment he ultimately may receive from them (NYSCEF Doc. No. 211, ¶¶ 87-95).

In their motion papers, among other things, the LIB defendants contend that Guglielmo’s status as a representative of LIB, which was Tea at Five’s General Manager, is insufficient for liability under the Debtor and Creditor Law to attach. At oral argument, they also stressed that the Debtor and Creditor Law claim is pled entirely on information and belief, and it lacks specificity as to the alleged transfers (*see Rocha* April 17, 2023 tr. at 18 lines 2-12). At oral argument, counsel for Rocha stated “that to obviate the need for further argument here, I wouldn’t even mind if Your Honor dismissed that cause of action with leave to replead” upon the discovery of any such illegal transfers, and to have such pleading deemed timely despite the expiration of the statute of limitations (*Rocha* April 17, 2023 tr. at 23 lines 9-19). As such, plaintiff acknowledged that he had no basis for the claim at present. The court therefore severs and dismisses the fifth cause of action alleging violations of the Debtor and Creditor Law as against Guglielmo and all other defendants named therein.¹³

¹³ This Court makes no ruling as to whether plaintiff may add a Debtor and Creditor Law claim at a later date. Instead, as the statute of limitations has expired, plaintiff must argue the issue if, in fact, he decides to add a cause of action.

As for the seventh cause of action alleging violations of FIFA against LIB, the LIB defendants argue that the references to “the hiring party” in Administrative Code § 20-929 show the limits of the FIFA (Freelance Isn’t Free Act). LIB was not the “hiring party” and they claim that, therefore, LIB cannot be liable. Additionally, they note that Rocha did not assert any argument against dismissal of this claim as against Guglielmo when the parties argued the dismissal motion for the first amended complaint.

Except with respect to the fifth cause of action under the Debtor and Creditor Law,¹⁴ Rocha opposes the motion. Rocha suggests it is premature at the pre-discovery stage because at this juncture it is unclear whether the LIB defendants, among others, participated in the discrimination and the retaliation. Additionally, Rocha states that the court should not evaluate the probability of his complaint’s ultimate success in a CPLR § 3212 motion or in a trial, as this “is irrelevant to the determination of a pre-disclosure CPLR 3211 motion to dismiss” (NYSCEF Doc. No. 203, *3, quoting *Palo v Cronin & Byczek, LLP*, 43 AD3d 1127, 1127 [2d Dept 2007] [internal quotation marks and citation omitted]).

Applying this standard, Rocha states that his allegations against the LIB defendants are sufficient as to the first cause of action for discrimination. Rocha claims that the court implicitly addressed the sufficiency of this claim against them when it granted Rocha’s motion to add the LIB defendants to the case. He states that this Court should adopt the Supreme Court decision, *Olam Corp. v Thayer* (2021 NY Slip Op 30345 [U], *2 [Sup Ct, NY County 2021]), which concluded that “leave to amend a complaint should be denied if the proposed complaint could not survive a motion to dismiss.” As support, Rocha stresses that the court granted the motion

¹⁴ Given plaintiff’s counsel’s representation at oral argument, this Court does not consider his prior opposition to the fifth cause of action.

after, during the November 2, 2022, oral argument, his counsel asserted that the proposed amended complaint “says at all time[s] hereto Defendant Joseph Guglielmo is an employee person with decision[]making authority and supervisor at Defendant Tea at Five” (NYSCEF Doc. No. 180, p 33 lines 7-17). Under *Olam*, this would have required a finding that the proposed amendment sufficiently stated a prima facie case.

Rocha argues that even if this Court does not accept its earlier finding as determinative of the LIB defendants’ current motion, it should not dismiss the first cause of action for discrimination. Rocha stresses that for the purposes of this motion, this Court should look only to the sufficiency of the allegations in the complaint (NYSCEF Doc. No. 203, *4, citing, inter alia, *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *Morales v Copy Right, Inc.*, 28 AD3d 440, 441 [2d Dept 2006]). The LIB defendants concede that the complaint identifies them as Rocha’s employers and states that they had decision-making authority. Rocha states although the LIB defendants deny this allegation, their contention is irrelevant to a CPLR § 3211 (a) (7) review. In addition, Rocha asserts that the complaint need only satisfy the notice pleading requirement – that is, the complaint ““need only give ‘fair notice’ of the nature of the claim and its grounds”” (NYSCEF Doc. No. 203, *3, quoting *Vig v New York Hairspray Co., L.P.*, 67 AD3d 140, 145 [1st Dept 2009]). Further, Rocha states that in general, the question of whether a defendant is an employer or joint employer of the plaintiff raises factual issues and thus it is not resolvable on a pleading motion to dismiss (NYSCEF Doc. No. 203, *5, citing *Zuccarini v PVH Corp.*, 2016 NY Misc LEXIS 673, *8, 2016 NY Slip Op 30350 [U], **6 [Sup Ct, NY County 2016]).

For similar reasons, Rocha rejects the LIB defendants’ position that under, *Bloomberg*, Guglielmo is insulated from liability. He argues that *Bloomberg* protects corporate owners from vicariously liability only where the owners are not personally involved in the alleged

discrimination. Here, on the other hand, the complaint asserts that Guglielmo was the individual who fired Rocha after Rocha complained of discrimination.

Also, according to Rocha, the documentary evidence does not support CPLR 3211 (a) (1) dismissal because the proof does not utterly refute the allegations in the complaint. Rocha concedes that the General Management Agreement does not expressly state that LIB, as general manager, had the power to make employment decisions, but Rocha contends that this does not dispose of the possibility that Tea at Five increased the scope of LIB's authority. The agreement itself supports this possibility, Rocha argues, as (1) section 3 states that LIB had the authority to negotiate and execute contracts for services and to "render[] such other services as customarily pertain to the position of general manager for a theatrical production," and (2) under section 5, Tea at Five could ask LIB to provide additional services, including those related to collective bargaining agreements (NYSCEF Doc. No. 203, *6, quoting NYSCEF Doc. No. 175, ¶¶ 3, 5). Collective bargaining agreements, Rocha notes, generally include employment matters. Rocha also points out that section 10 of the agreement allows "LIB to negotiate and enter into contracts and to incur liabilities on Producer's behalf (subject to prior consultation with Producer and Producer's giving its approval thereto), to sign and execute such approved contracts, to sign bank drafts and checks on Producer's account," and he states that the language protecting LIB from liability shows that Tea at Five intended that LIB would operate as its agent (NYSCEF Doc. No. 203, *6-7, quoting NYSCEF Doc. No. 175, ¶ 10). Finally, Rocha argues that the statements in his affidavit, which the LIB defendants do not attach, do not contradict his complaint, and that any arguments to that effect merely create factual disputes.

Rocha next argues that he has stated a viable claim against Guglielmo for aiding and abetting under the CHRL, his second cause of action. Rocha reiterates that his complaint alleges

that Guglielmo bore personal responsibility for the purported discriminatory actions. Further, Rocha notes that the LIB defendants rely exclusively on federal cases, which may be persuasive but are not controlling. As for the third cause of action for retaliation, Rocha argues that his complaint satisfactorily alleges a viable claim against both LIB defendants. Specifically, Rocha points to paragraphs in the complaint that state he engaged in protected activity when he complained about Dunaway's discriminatory comments, that the LIB defendants knew about his complaint because, inter alia, he notified Guglielmo directly, that Rocha's termination qualifies as an adverse employment action, and that the termination is causally linked to Rocha's protected activity (NYSCEF Doc. No. 203, citing, inter alia, NYSCEF Doc. No. 211, ¶¶ 40-44, 46-51, 64, 68). Rocha contends that this satisfies the four-prong test that the Court of Appeals set forth in *Forrest* (NYSCEF Doc. No. 203, *9, quoting *Forrest*, 3 NY3d at 312 [2004]). Additionally, Rocha notes that the subheading for this cause of action expressly states that he asserts the claim against all defendants.

Rocha contends that his seventh cause of action under FIFA is viable as against Guglielmo, and that the LIB defendants merely raise factual challenges in support of their application for dismissal. Rocha argues that although he has characterized himself as an employee and FIFA applies to independent contractors, the complaint permissibly pleads the causes of action in the alternative. Further, Rocha notes that the court agreed with his position during the November 2, 2022, oral argument (NYSCEF Doc. No. 180, p 47 line 13 – p 48 line 7). Rocha alleges that the LIB defendants controlled the Tea at Five bank account and that under the General Management Agreement they had the authority to negotiate and execute employment contracts. He states that this sufficiently brings them LIB defendants within the purview of FIFA.

In reply, the LIB defendants first challenge the assumption that by granting the motion to amend in motion sequence number 002, this Court implicitly ruled on the viability of the cause of action. Instead, they note that they withdrew their motion “without prejudice to making a motion to dismiss the Second Amended Complaint . . .” (NYSCEF Doc. No. 161 [Decision and Order on Motion Sequence Numbers 002 and 003]). The LIB defendants reiterate that this Court must dismiss the first cause of action for discrimination because they are not joint employers with or agents of Tea at Five. They state that Rocha’s own affidavit underscores this fact, as Rocha acknowledges that Lombardo rather than Dunaway was his boss (NYSCEF Doc. No. 205, *3-4, citing, inter alia, NYSCEF Doc. No. 30 [Rocha Aff], ¶ 15). The LIB defendants cite *Mira v Harder (Evans)* (177 AD3d 426, 426-427 [1st Dept 2019]), which states that speculative and unbelievable allegations are not sufficient to state a viable retaliation claim, in support of their position that the allegations against them are insufficient (*see* NYSCEF Doc. No. 205, *4). The LIB defendants also argue that *Brankov v Hazzard* (142 AD3d 445 [1st Dept 2016]), which affirmed the trial court’s order granting summary judgment, refutes Rocha’s allegation that a joint employer relationship existed (NYSCEF Doc. No. 205, *4).

According to the LIB defendants, the complaint’s sole contention against them is contained in paragraph 46, which shows that Tea at Five texted them with the directive that they should tell Rocha he was fired, and that this does not support the claim that the LIB defendants were his employers or joint employers. The LIB defendants state that Rocha concedes they had no explicit supervisory, hiring, or firing authority under the General Management Agreement. They reject his position that the provisions relating to collective bargaining support Rocha’s claim, as he was not part of a union and was not subject to collective bargaining. The LIB defendants further state that the agreement’s statement that Tea at Five could expand the scope

of their responsibilities does not create an issue of fact, as Rocha has presented only a “fantastical set of theoretical facts contrary to the documents” (*id.*, *6).

In support of their position that Rocha’s contentions are speculative and conclusory, the LIB defendants rely on *Adler v 20/20 Cos.* (82 AD3d 915 [2d Dept 2011] [affirming dismissal of claim against Verizon where contractual provision gave 20/20 the sole right to hire, manage, evaluate, discipline, promote, terminate, and supervise employees]). They reiterate their position that, as LIB cannot be deemed an employer or joint employer, the court also should dismiss all claims against Guglielmo. The LIB defendants also repeat their arguments in favor of the dismissal of the second (aiding and abetting discrimination), third (retaliation), and seventh (violations of FIFA) causes of action. They incorrectly suggest that Rocha did not oppose these prongs of their motion; they apparently mean that they find his opposition conclusory and unpersuasive.

At this juncture, before any discovery has occurred, the LIB defendants have not shown conclusively that they are neither employers, joint employers, nor agents of Tea at Five for the purposes of the NYSHRL and the NYCHRL. Under the immediate control test, upon which the LIB defendants rely for their argument that they were not Rocha’s joint employers, courts consider factors including “commonality of . . . firing, discipline, [and] pay” (*Brankov*, 142 AD3d at 446). Here, as the complaint states, it was the LIB defendants who informed Rocha that he was fired. The LIB defendants do not dispute this fact; instead, they simply argue that they bore no responsibility in the decision-making process. However, this raises a factual issue not ripe for CPLR § 3211 resolution. Further, the LIB defendants’ position here that they fired Rocha in their capacity as agents of Tea at Five contradicts their argument that they were not agents of Tea at Five (*see* NYSCEF Doc. No. 176, *8). Thus, the allegations in the complaint

“plausibly suggest a degree of control and involvement by [the defendant] in Plaintiff’s employment” (*Zuccarini v PVH Corp.*, 2016 NY Slip Op 30350 [U], *4 [Sup Ct, NY County 2016] [in the context of a Labor Law case]), and the LIB defendants’ arguments merely raise issues of fact that are premature here. Finally, for the reasons stated below in connection with motion sequence number 006, the LIB defendants may be liable under the second cause of action for aiding and abetting even absent any ownership or control (*see Lax v City Univ. of N.Y.*, 2023 NY Slip Op 50922 [U], *16 [Sup Ct, Kings County 2023]).

The contractual agreement on which the LIB defendants rely also is not dispositive. In addition to the responsibilities it specifically defines, the agreement provides that LIB shall “render such services as may customarily and reasonably be required . . . to be rendered by the general manager of a dramatic stage production” (NYSCEF Doc. No. 175, ¶ 2), and in the list of services that LIB was expected to provide, the agreement states that LIB is responsible for other roles “in accordance with prevailing industry custom and practice” (*id.*, ¶ 3). Finally, the agreement states that the producer may require LIB “to furnish additional services . . . which do not customarily pertain to the office of general manager for a theatrical production” (*id.*, ¶ 5). This creates additional factual issues concerning the LIB defendants’ potential and actual responsibilities under the agreement.

Under section 273 of the Debtor and Creditor Law, “a transfer by a debtor may be voidable where the creditor’s claim arose prior to the transfer, if the debtor made the transfer with the intent to hinder, delay, or defraud any creditor of the debtor” (*Longbride Fin., LLC v Admin Realty, LLC*, 82 Misc. 3d 1115, 1122-1123 [Sup Ct, Queens County 2024]), and section 275 of the law states that “every conveyance made and every obligation incurred without fair consideration when the person making the conveyance or entering into the obligation intends or

believes that he will incur debts beyond his ability to pay as they mature, is fraudulent as to both present and future creditors” (Debtor and Creditor Law § 275). In support of his claim, Rocha merely alleges in his complaint that Guglielmo, Lombardo, Feldman, and Beck deliberately transferred Tea at Five’s assets to themselves to avoid paying him the fruits of any judgment he ultimately may receive from them (NYSCEF Doc. No. 211, ¶¶ 87-95).

The Freelance Isn’t Free Act, which is the basis of the seventh cause of action, only applies to the “hiring party.” The definitions section clarifies that the hiring party is “any person who retains a freelance worker to provide any service,” with some inapplicable exceptions (Admin Code § 20-927 [3]). Thus, section 20-928 (a) makes it clear that the hiring party is the party that enters into a contract with the freelance worker. Here, too, the LIB defendants rely on their argument that they were not “the hiring party.” However, as stated above, this issue is not ripe for resolution. This Court also rejects the LIB defendants’ argument that Rocha’s assertion of a cause of action under FIFA is inconsistent with his assertion that the LIB defendants employed him. This Court agreed on the record with Rocha’s position that he was entitled to plead this claim in the alternative.

Motion Sequence 006

In motion sequence number 006, the Ben-Zvi defendants challenge the validity of the service of the second amended complaint on FGRB, which was the first complaint that named them as defendants. They point to the affidavits of service, which indicate that plaintiff served Mr. Ben-Zvi and FGRB by service on Tanner Jacobson, a “Community Associate” (NYSCEF Doc. Nos. 212, 213). According to the Ben-Zvi defendants, Tanner Jacobson works for the commercial tenant from which they sublease their office space, and he is not authorized to accept

service on their behalf (NYSCEF Doc. No. 231, ¶ 9).¹⁵ They further note that they preserved this argument as one of their affirmative defenses, which states that “Plaintiff has failed to serve Defendant Feldman Golinski Reedy + Ben-Zvi, PLLC . . . and therefor failed to obtain jurisdiction over [the firm]” (*id.*, ¶ 11). Accordingly, in their motion, the Ben-Zvi defendants seek dismissal or a traverse hearing as against FGRB, the defendant they named in this affirmative defense.

In opposition, plaintiff argues that service upon Ben-Zvi constitutes service upon the LLC.¹⁶ This is incorrect. Plaintiff properly served Ben-Zvi through service upon “a person of suitable age and discretion at [his] actual place of business . . . and by mailing the summons by first class mail . . . at his . . . actual place of business” (CPLR § 308 [2]). However, plaintiff was obliged to serve FGRB separately, and he did so through an identical process.

While service on a suitable individual at Ben-Zvi’s place of business is proper for service on an individual, service on a corporation must be performed on “an officer, director, managing or general agent, or cashier or assistant cashier or to any other agent authorized by appointment or by law to receive service’ on behalf of the corporation” (*Bezoza v Bezoza*, 83 AD3d 578, 579 [1st Dept 2011], quoting CPLR § 311 [a] [1]). Thus, although service on Jacobson was proper on Ben-Zvi individually, the Ben-Zvi defendants have raised a viable challenge as to service on the corporation (*see Bezoza*, 83 AD3d at 579). As plaintiff does not raise other arguments in opposition to the challenge to service, the sworn and non-conclusory affidavit is sufficient to

¹⁵ In response to plaintiff’s argument that Ben-Zvi’s affirmation does not constitute a sworn denial of service such that a traverse hearing is required, the Ben-Zvi defendants submit Ben-Zvi’s sworn statement (NYSCEF Doc. No. 231), thus negating this argument. This Court cites to the affidavit rather than the original affirmation (NYSCEF Doc. No. 209).

¹⁶ This Court does not address the Ben-Zvi defendants’ challenge that Ben-Zvi, individually, was not properly served, as the motion only challenges service upon FGRB.

warrant a traverse hearing (*see Nationstar Mtge. LLC v McCallum*, 167 AD3d 523, 524 [1st Dept 2018]). The other challenges to the complaint by FGRB are held in abeyance pending the resolution of the traverse hearing.

The first (discrimination), second (aiding and abetting discrimination), third (retaliation), and seventh (violations of FIFA) causes of action are asserted against defendant Ben-Zvi individually. The Ben-Zvi defendants argue that the first cause of action for discrimination must be dismissed against Ben-Zvi. They note that Ben-Zvi is mentioned specifically in the complaint on a mere handful of occasions. Ben-Zvi is identified as “a lawyer, principal partner, principal, and person with decision-making authority at Defendant FGRB” (NYSCEF Doc. No. 211, ¶ 21). Further, the complaint states that “[o]n July 1, 2019, [he] emailed counsel for the Plaintiff regarding the \$3,000 that Defendants owe to Plaintiff” and that the email informed plaintiff’s counsel that payment would only be issued if plaintiff signed a general release from liability (*id.*, ¶ 57). The complaint also states Ben-Zvi did not provide plaintiff with a release, and defendants did not pay plaintiff the money they owed him. The Ben-Zvi defendants state that the complaint does not identify Ben-Zvi as plaintiff’s employer or as an agent of his employer, and it does not state that Ben-Zvi’s decision-making authority at FGRB gave him such authority with respect to plaintiff’s employment. Thus, they conclude that the complaint does not allege a viable claim against him under the CHRL.

Ben-Zvi’s affidavit adds a personal denial. He contends that “under no circumstances was I acting as an employer or agent of any employer who was allegedly discriminating against Plaintiff because of his ‘actual or perceived age, race, creed, color, national origin, gender, disability, marital status, partnership status, caregiver status, sexual orientation, uniformed service, or alienage or citizenship status’” (NYSCEF Doc. No. 231, ¶ 17). Additionally, Ben-Zvi

states that he did not “discharg[e] [plaintiff] from employment or discriminat[e] against him regarding the compensation, terms, conditions or privileges of his employment with Defendant Faye Dunaway” (*id.*, ¶ 18). The affidavit includes a more comprehensive quotation from the correspondence between the parties which, the Ben-Zvi defendants state, shows that the Ben-Zvi email “was in direct response to the litigious tone of Plaintiff’s lawyer’s . . . email,” which included a copy of a summons and verified complaint and a request for a settlement discussion (*id.*, ¶ 26). Ben-Zvi acknowledges that on July 1, 2019, he emailed Rocha’s counsel and indicated that in light of Rocha’s threat of litigation, “the only way that a check could be issued to Plaintiff was if Plaintiff signed a general release” (*id.*, ¶ 28). Ben-Zvi also cites to his statement in the email that, pending resolution by settlement or litigation, “we will likely need to hold funds in escrow or deposit such funds into court pending the outcome of litigation” (NYSCEF Doc. No. 216, ¶ 216),¹⁷ but intimates that he did not do so when Rocha’s attorney did not respond to his email (NYSCEF Doc. No. 231, ¶ 30).

Ben-Zvi argues that the second cause of action for aiding and abetting discrimination also should be dismissed as against him. The New York City Administrative Code (Administrative Code) § 8-107(6) states that it is unlawful for “any person to aid, abet, incite, compel; or coerce the doing of any of the acts forbidden under this chapter, or attempt to do so.” Ben-Zvi argues that an Administrative Code § 8-107(6) claim must allege that the defendant in question was an active participant in the alleged discriminatory conduct. According to Ben-Zvi, none of the allegations against him relate to discriminatory activity on his part. Instead, he merely sought to avoid litigation by requiring a general release before Tea at Five paid plaintiff for his last two weeks of work. Ben-Zvi notes that he proposed holding the funds in escrow during the pendency

¹⁷ Ben-Zvi contends that “we” refers to the firm rather than to him personally.

of any dispute, although, as he concedes, an escrow or court account was not created (NYSCEF Doc. No. 227, ¶ 38).

For the same reason that Ben-Zvi challenges the applicability of the first (discrimination) and second (aiding and abetting discrimination) causes of action, he contends that the third cause of action for retaliation must be dismissed as against him. Additionally, like the LIB defendants, he argues that the seventh cause of action (violations of FIFA) is not viable as against him because he was not the hiring party within the meaning of Administrative Code § 20-919.

In opposition,¹⁸ Rocha points to the First Department's statement in *Vig* (67 AD3d at 145) that notice pleading standards generally apply to employment discrimination claims. He also quotes *Zuccarini v PVH Corp.* (2016 NY Slip Op 30350 [U], *6 [internal quotation marks and citation omitted]), for the proposition that, at the pleading stage, a plaintiff need not "plead specific facts establishing single or joint employment in order to survive a motion to dismiss." Based on these principles, plaintiff argues that his complaint is sufficient as against Ben-Zvi. The allegations that defendants discriminated against him based on his sexual orientation and retaliated against him by firing him, that his wages were withheld based on his sexual orientation, and that Ben-Zvi participated in the decision to discriminate, Rocha explains, were asserted against defendants collectively, and thus apply to Ben-Zvi. Further, Rocha states that Ben-Zvi is vicariously liable for FGRB's actions.

¹⁸ As in response to the LIB defendants' motion, plaintiff claims that when this Court granted leave to add Ben-Zvi, this Court implicitly determined that the claims against him were not palpably insufficient. A court may exercise its discretion and deny a motion to amend where the amendments would not survive a CPLR § 3211 motion (*see Durst Pyramid LLC v Silver Cinemas Acquisition Co.*, 222 AD3d 431, 432 [1st Dept 2023]). However, the Ben-Zvi defendants were not defendants at that time and were not able to oppose the motion. Therefore, the court exercises its discretion and considers Ben-Zvi's arguments.

Additionally, Rocha states that Ben-Zvi has not satisfied the standard for dismissal under CPLR § 3211 (a) (1). Ben-Zvi's affidavit, plaintiff contends, is not documentary evidence within the meaning of the statute.¹⁹ Rocha argues that the emails on which Ben-Zvi relies are insufficient because it represents an attempt to settle the discrimination and retaliation claims by paying him his earned wages. Thus, Rocha contends that the email actually supports his contention that Ben-Zvi was involved in the discrimination and the retaliation.

Rocha also argues that the allegations in the complaint support the second cause of action against Ben-Zvi for aiding and abetting the discrimination, presumably relying on his arguments above. As for the third cause of action for retaliation, Rocha states that the complaint alleges that he engaged in a protected activity, hiring an attorney when he was fired, that Ben-Zvi knew Rocha had complained about Dunaway's conduct, that Rocha suffered an adverse employment action, and that a causal connection exists between the protected activity and the retaliatory conduct. Thus, it satisfies the standard that the Court of Appeals articulated in *Forrest* (3 NY3d at 312-313). Rocha states that his fourth cause of action, asserting that FGRB is vicariously liable for the actions of Ben-Zvi, is sufficient because of the complaint's allegation that he is a member of the firm. Finally, he states that the seventh cause of action, alleging violations of FIFA, is sufficient under the notice pleading standard.

In reply, Ben-Zvi first argues that Rocha's complaint is not verified and Rocha's June 18, 2020 affidavit in support (NYSCEF Doc. No. 227) is inadequate because Rocha submitted the same affidavit in conjunction with prior motion papers, and he has not provided a new verification or an updated affidavit. However, a plaintiff is not required to submit an affidavit or

¹⁹ Plaintiff challenged Ben-Zvi's earlier affirmation (NYSCEF Doc. No. 209) as insufficient. Ben-Zvi responded by filing his affidavit in support (NYSCEF Doc. No. 231), thus rendering the objection moot.

any evidentiary support at this juncture if he or she is confident that the pleadings set forth a viable cause of action (*see Rovello v Orofino Realty Co.*, 40 NY2d 633, 635 [1976]).

Next, Ben-Zvi contends that neither plaintiff's 2020 affidavit nor the second amended complaint includes any allegations that tie him to the alleged discrimination. In addition to the references in the complaint, which he described in his initial papers in support, Ben-Zvi notes that the Rocha affidavit refers to him by name in two instances. First, Rocha quotes the email in which Ben-Zvi told his attorney that Tea at Five would withhold payment for his last two weeks of work unless he signed a release. Second, he points to the paragraph which states that Ben-Zvi, among others, directed the transfer of assets of Tea at Five "with the particular intent to defraud me" (NYSCEF Doc. No. 227, ¶ 39). The court notes that Rocha, discussing the email from Ben-Zvi, also stated that "[m]y lawyer has informed me that the failure of TEA AT FIVE to pay me the \$3,000 constitutes additional retaliation and serves as the basis for additional claims . . . (*id.*, ¶ 35). Ben-Zvi reiterates that, instead, he viewed the proposal as a good faith settlement offer. Finally, Ben-Zvi restates his arguments in support of dismissal of the causes of action asserted against him.

Here, Ben-Zvi cannot be held liable as an employer of Rocha for the purposes of the first cause of action for discrimination. Unlike Feldman, Ben-Zvi was not involved in the hiring process and did not prepare the employment agreement. He also did not handle complaints relating to Rocha's treatment, and thus was not involved in the handling of Rocha's discrimination claims. Unlike the LIB defendants, Ben-Zvi did not inform Rocha that his employment was terminated. The mere fact that the complaint stated that "defendants" had discriminated, retaliated, and otherwise violated Rocha's rights is insufficient where, as here, the complaint does not assert that Ben-Zvi participated in the alleged wrongful actions. Instead, the

allegations against him are conclusory, and the first cause of action for discrimination is dismissed as against Ben-Zvi (*see Abe v Cohen*, 115 AD3d 491, 491 [1st Dept 2014]).

The second cause of action for aiding and abetting discrimination is similarly conclusory. Rocha fails to plead any allegations that the email sent by Ben-Zvi in response to Rocha's attorney's email aided and abetted discrimination by any other defendant. In opposition, Rocha fails to further explain why the email constitutes aiding and abetting discrimination and only asserts that "Plaintiff's allegations are sufficient to state a cause of action as against Defendant Ben-Zvi for aiding and abetting" (NYSCEF Doc. No. 223 at 7). These conclusory statements, together with a failure to demonstrate any employment or quasi-employment relationship between Ben-Zvi and Rocha, necessitate dismissal of the second cause of action for aiding and abetting discrimination. For similar reasons, this Court dismisses the seventh cause of action under FIFA as against Ben-Zvi.

The third cause of action asserts that Ben-Zvi retaliated against Rocha in violation of Administrative Code § 8-107 (7), which states that it is impermissible for "any person engaged in any activity to which this chapter applies to retaliate or discriminate in any manner against any person." As stated, the complaint relies on the July 1, 2019 email from Ben-Zvi to Rocha's counsel indicating that defendants would not pay Rocha his wages or any additional funds unless he agreed not to sue them for discrimination. In opposition, Ben-Zvi provides the rest of the email chain which reveals that Ben-Zvi's email was sent in response to an email from plaintiff's counsel "in a good faith attempt to resolve this matter" (NYSCEF Doc. No. 209 ¶ 22). This context shows the allegedly retaliatory email was not a threat but rather was an attempt to settle the matter in response to an email by Rocha's attorney indicating his willingness to resolve the issue without litigation (*id.* ¶ 22-26). The First Department has upheld the striking of allegations

involving offers to settle as irrelevant to a plaintiff's complaint (*see Soumayah v Minnelli*, 41 AD3d 390, 393 [1st Dept 2007]). "The allegations with respect to threatening litigation should no settlement be achieved is tautological, and is thus, not probative on the issue of retaliation" (*Kenzo Digital Immersive, LLC v Zeitgeist Parallax Inc.*, 2022 NY Slip Op 30943[U] [Sup Ct, NY County 2022] [citing *Soumayah*, 41 AD3d at 392-393]). The third cause of action as against Ben-Zvi is based on nothing other than his email offer to Rocha to sign a general release in order to receive his wages, an attempt to settle with Rocha's counsel. Accordingly, Rocha's cause of action alleging retaliation is dismissed as against defendant Ben-Zvi.

Conclusion

For these reasons and after a thorough consideration of all issues, it is

ORDERED that motion sequence number 004, which seeks to compel arbitration or to dismiss all claims against defendant Feldman, is denied except to the extent of severing and dismissing the fifth cause of action as against Feldman and all defendants; and it is further

ORDERED that plaintiff's cross-motion under motion sequence number 004 is denied; and it is further


ORDERED that motion sequence number 005, which seeks dismissal of the action as against the LIB defendants, is granted to the limited extent of severing and dismissing the fifth cause of action as against all defendants; and it is further

ORDERED that motion sequence number 006, which seeks dismissal of the action as against Ben-Zvi and FGRB, is granted to the extent of dismissing the action as against Ben-Zvi, denied as to the remaining claims as against FGRB, and held in abeyance as against FGRB pending the determination of a traverse hearing; and it is further

ORDERED that a Judicial Hearing Officer (“JHO”) or Special Referee shall be designated to hear and report on the issue of service on defendant FGRB which is hereby submitted to the JHO/Special Referee for such purpose; and it is further

ORDERED that this matter is hereby referred to the Special Referee Clerk for placement at the earlier possible date upon the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on the website of this court), shall assign this matter at this initial appearance to an available JHO/Special Referee to hear and report as specified above or, upon the consent of counsel, to hear and determine.

The clerk shall enter judgment accordingly.

<u>1/23/2025</u> DATE					 SHLOMO S. HAGLER, J.S.C.	
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION		
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER		
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input checked="" type="checkbox"/>	REFERENCE