At an IAS Trial Term, Part 75 of the Supreme Court of the State of New York, Kings County, at the Courthouse located at 360 Adams Street, Brooklyn, New York on the 2nd day of June 2025

PRESENT: HON. ANNE J. SWERN, J.S.C.

AMIR RAHNAMAY-AZAR,

Plaintiff,

-against-

BRIDGE CITY COLLECTIVE, LLC, GSCC, MANAGEMENT LLC, OBCC, LCC, UHCC, INC., FSCC, LLC, HCCC, LLC, DAVID ALPORT and JASON KABBAS,

Defendants.

DECISION & ORDER
Index No.: 526892/2024

Calendar No.: 38 & 39

Motion Seq.: 3 & 4

Recitation of the following papers as required by CPLR 2219(a):

	Papers Numbered
Defendants' Notice of Motion, Affirmation, Affidavits and Exhibits (NYSCEF 32-48)	1, 2
Plaintiff's Notice of Cross-Motion, Affirmation in Support, and in Opposition to Defendants' Motion and Exhibits (NYSCEF 43-46)	3, 4
Defendants' Reply Memorandum of Law and in Opposition to Plaintiff's Cross-Motion (NYSCEF 49)	5

Upon the foregoing papers and after oral argument, the decision and order of the Court is as follows:

Plaintiff, the former Chief Financial Officer of Bridge City through its affiliate entities, commenced this action to recover equity interests in the companies established by defendants and unpaid compensation per his employment agreement with defendants. Plaintiff's complaint alleges three causes of action, *i.e.*, two causes of action for breach of contract, and a third cause of action pursuant to New York Labor Law § 198 [1-a] (NYLL) for unpaid wages

Defendants have now served a pre-answer motion for an order pursuant to CPLR § 3211 [a] [1] and [7] as follows: (1) dismissing only the third cause of action as against all defendants and, (2) dismissing this action in its entirety against only defendants Alport and Kabbes i/h/s/a Kabbas, individually. In support of the motion, defendants argue that the complaint fails to state a cause of action because (1) the choice of law clause in the employment agreement dated 11/5/2021 designating the laws of Delaware as the governing law precludes a NYLL wage claim (*Feldman v Smart Choice Communications, LLC*, 41 AD3d 343 [1st Dept 2007]); (2) NYLL § 198 [1-a] does not create a substantive right or cause of action, only a remedy; and (3) an executive earning more than $1,300 per week is exempt from the provisions of the NYLL (*see* NYLL § 198-c [3]).

In response, plaintiff has served a cross-motion for an order pursuant to CPLR § 3025 [b] granting leave to amend the complaint to plead NYLL § 191 and to lift the stay of discovery pursuant to CPLR § 3214 [b].

a) CPLR § 3211 [a] [1]

"A motion pursuant to CPLR § 3211 [a] [1] to dismiss the complaint on the ground that the action is barred by documentary evidence may be [appropriately] granted only where the documentary evidence utterly refutes the plaintiff's factual allegations, thereby conclusively establishing a defense, as a matter of law" (*Karpovich v City of New York*, 162 AD3d 996, 997 [2d Dept 2018] *citing Mawere v Landau*, 130 AD3d 986, 987 [2d Dept 2015]; *see also Beal Sav. Bank v Sommer*, 8 NY3d 318, 324 [2007] [The construction of an unambiguous contract is a matter of law.] and *Goshen v Mutual Life Insurance Co. of N.Y.*, 98 NY2d 314, 326 [2002]). "To constitute 'documentary' evidence, the evidence must be unambiguous, authentic, and

undeniable" (*Karpovich v City of New York*, 162 AD3d at 997-998; *see Prott v Lewin & Baglio*, 150 AD3d 908, 909 [2d Dept 2017]).

b) CPLR § 3211 [a] [7]

The allegations in a complaint must be sufficient to state all of the necessary elements of a cognizable cause of action to survive a motion to dismiss (*See Rovello v Orofino Realty Co.*, 40 NY2d 633, 635 [1976]; CPLR § 3211 [a] [7]). When determining such a motion, the Court must accept the factual allegations in the complaint as true and "accord plaintiffs the benefit of every possible favorable inference and determine only whether the facts as alleged fit into any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 88 [1994]).

Defendants bear the burden of establishing that a complaint "fails to state a viable cause of action" (*Martinez v NYC Health and Hospital Corporation*, 223 AD3d 731, 732 [2d Dept. 2024]; and *Board of Mgrs. of 100 Congress Condominium v SDS Congress, LLC*, 152 AD3d 478, 480 [2d Dept. 2017]). Once defendants submit evidentiary material in support of a CPLR §3211 [a] [7] motion, "the criterion then becomes whether [plaintiff] has a cause of action, not whether [he] has stated one (*id.*).

When the Court considers evidentiary material outside the pleadings and the motion is not converted to one for summary judgment, "the question becomes whether the pleader has a cause of action, not whether the pleader has stated one and, unless it has been shown that a material fact as claimed by the pleader is not a fact at all, and unless it can be said that no significant dispute exists regarding it, [a] dismissal should not [be granted]" (*Board of Mgrs. of 100 Congress Condominium v SDS Congress, LLC*, 152 AD3d 480).

c) Choice of Law

Under the New York common law rule, matters of procedure are governed by the law of the forum and since matters of substantive law fall within a choice of law analysis, the Courts will apply *contractual* choice of law clauses only to substantive issues (*Matter of Frankel v Citicorp Ins. Servs., Inc.,* 80 AD3d 280, 285-286 [2010] [*italics added*]). This is because when the parties contractually agree to a choice of law provision,

> ...they intend that the law of the chosen state – and no other state – ill [sic] be applied. In such a situation, the chose state's substantive law – but not its common law conflict of law principles or statutory choice of law directives – is to be applied, unless the parties expressly indicate otherwise. (*Ministers & Missionaries Benefit Board v. Snow,* 26 NY3d 466, 468 [2015]).

This principle is grounded in the basic precept of contract interpretation that agreements should be construed to effectuate the parties' intent" (*Welsbach Electric Corp. v MasTec. N. Am., Inc.,* 7 NY3d 624, 629 [2006]). As such, "New York courts should not engage in any conflicts analysis where the parties include a choice-of-law provision in their contract" (*Ministers & Missionaries Benefit Board v. Snow,* 26 NY3d 474-475).

However, New York courts are required to depart from this general principle and "apply the law of the state with the most significant relationship [to] the particular issue in conflict" (*Indosuez Intl. Fin. v National Reserve Bank,* 98 NY2d 238, 245 [2002], *citing Zeevi & Sons v Grindlays Bank,* 37 NY2d 220, 226-227 [1975]).

d) Analysis

Although the choice of law clause in the 11/5/2021 employment agreement evinces an unambiguous intent to apply Delaware's substantive law (*Ministers & Missionaries Benefit Board v. Snow,* 26 NY3d 468), defendants' reliance on *Feldman v Smart Choice*

Communications, LLC, supra, that plaintiff cannot assert an extra-contractual claim pursuant to the NYLL is misplaced. In *Feldman,* the choice of law clause read as follows:

> 12.0 Applicable Law. This Agreement shall be governed in all respects, whether as to validity, construction, capacity, *performance or otherwise*, by the laws of the State of New Jersey. (*italics added*).

More importantly, the Second Department has rejected this interpretation (*Twinlab Corporation v Terry Paulson,* 283 AD2d 570, 571 [2d Dept 2001] ["{T}he choice of law provision…did not preclude the plaintiffs from asserting a tort cause of action [ ] based on [a] Florida statute.]). The choice of law provision in *Twinlab* stated, *inter alia,* that the *"validity, interpretation, construction and performance"* of the agreement would be governed by and construed in accordance with New York law." (*id.*). Nevertheless, the "governing law" clause before this Court does not recite any of the foregoing language (*see* NYSCEF 35, p.5 ["**Governing Law**: This offer letter shall be governed by the laws of Delaware, without regard to conflict of law principles."]).

The clause in plaintiff's employment agreement does not demonstrate a clear intent to opt out of the NYLL. New York state has the greatest interest concerning the third cause of action because NYLL defines an important state interest to provide statutory protections to employees within its borders (*id.*).

Plaintiff, as the Chief Financial Officer, was to receive a combined annual base pay from all three entities of $90,000.00, which exceeds the cap imposed by NYLL § 198-c [3] (NYSCEF 35, p.7). The complaint is devoid of factual allegations concerning plaintiff's day-to-day duties to establish that he was not employed in a "bona fide executive, administrative *or* professional capacity" (NYLL § 198-c [3]). Plaintiff's opposition only addressed whether the allegations in

the complaint established that he was not an executive with managerial duties to hire, fire and supervise employees (NYSCEF 46, pp.9-10). The remaining two categories were unopposed.

The description of plaintiff's duties in the contract conclusively and unambiguously establishes that plaintiff was exempted from the protections of the NYLL under the broad categories of "administrative or professional capacity" with an equity interest in the companies (*Karpovich v City of New York*, 162 AD3d 997-998; CPLR § 3211 [a] [1]). Further, the contract permitted plaintiff to engage in non-work related activities during business time provided that a majority of his business time was devoted to the company (NYSCEF 35, p.2). Based on these facts, the complaint together with the employment agreement establish that plaintiff does not have a cause of action under the NYLL (*Martinez v NYC Health and Hospital Corporation*, 223 AD3d 732; *Board of Mgrs. of 100 Congress Condominium v SDS Congress, LLC*, 152 AD3d 480).

Based on the foregoing, the third cause of action fails to state a cause of action under NYLL §191, 198 or 198-c (*Leon v Martinez*, 84 NY2d 88). The first and second causes of action are also dismissed only as to the individual defendants as plaintiff has not opposed this branch of defendants' motion.

Plaintiff's motion to amend the complaint is denied based on the failure to submit a proposed amended complaint "clearly showing the changes or additions to be made to the [complaint]" to establish that plaintiff has a cause of action (CPLR § 3025 [b]). In plaintiff's memorandum of law, there is a request for leave "to amend the Complaint to add a citation to the statute, noting Defendants' violation of Labor Law § 191" (NYSCEF 46, p.7, fn.3). The addition of just the citation without more would not defeat defendants' motion to dismiss. As stated

above, the allegations concerning plaintiff's day-to-day duties in the complaint do not establish a violation of the NYLL.

Plaintiff's motion to lift the stay of discovery is granted to the extent that discovery shall proceed after defendants serve an answer to the complaint in accordance with CPLR § 3211 [f]. Once an answer is served, discovery in this action shall proceed.

The Court has considered the parties' remaining arguments and finds same to be without merit.

Accordingly, it is hereby

ORDERED that defendants' motion pursuant to CPLR § 3211 [a] [1] and [7] dismissing the third cause of action only against all defendants is granted (MS 003), and it is further

ORDERED that defendants' motion pursuant to CPLR § 3211 [a] [1] and [7] dismissing this action in its entirety against only DAVID ALPORT and JASON KABBES i/s/h/a JASON KABBAS individually is granted (MS 003), and it is further

ORDERED that plaintiff's motion to amend the complaint pursuant to CPLR § 3025 [b] is denied (MS 002), and it is further

ORDERED that plaintiff's motion to lift the stay of discovery pursuant to CPLR § 3214 [b] is granted to the extent that discovery shall proceed after defendants serve an answer to the complaint in accordance with CPLR § 3211 [f] (MS 004), and it is further

ORDERED that upon filing proof of service of this Order with Notice of Entry with ten (10) days of entry in NYSCEF, the Clerk of the Court shall amend the Clerk's minutes to reflect the new caption as follows (MS 003):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

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AMIR RAHNAMAY-AZAR,

Plaintiff, Index #526892/2024

-against-

BRIDGE CITY COLLECTIVE, LLC, GSCC, MANAGEMENT LLC, OBCC, LCC, UHCC, INC., FSCC, LLC, AND HCCC, LLC,

Defendants.

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This constitutes the decision and order of the Court.

ENTER:

Hon. Anne J. Swern, J.S.C.
Dated: 6/2/2025

For Clerks use only:

MG _____

MD _____

Motion seq. # _____