

<b>Berenbaum v Joffrey Ballet Ctr. for Am. Dance, Inc.</b>
2012 NY Slip Op 31021(U)
April 13, 2012
Supreme Court, New York County
Docket Number: 108552/11
Judge: Doris Ling-Cohan
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# SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: DORIS LING-COHAN  
J.S.C.  
Justice

PART 36

Beth D. Berenbaum

INDEX NO. 108552/11

-v-

Soffrey Ballet Center for American Dance, Inc.  
d/b/a Soffrey Ballet School, et al.

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 001

The following papers, numbered 1 to \_\_\_\_\_, were read on this motion to/for \_\_\_\_\_

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ No(s) 1, 2

Answering Affidavits — Exhibits (cross-motion) No(s) 3, 4, 5


Replying Affidavits (memo of law) No(s) 6

Upon the foregoing papers, it is ordered that this motion <sup>and cross-motion</sup> is decided in accordance with the attached memorandum decision.

**FILED**  
APR 17 2012  
NEW YORK  
COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 4/13/12

  
\_\_\_\_\_, J.S.C.  
**DORIS LING-COHAN**  
J.S.C.

- 1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
- 3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER
- DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 36

-----x  
BETH D. BERENBAUM,

Plaintiff,

-against-

Index No.: 108552/11

Motion Seq. 001

JOFFREY BALLET CENTER FOR AMERICAN  
DANCE, INC. d/b/a JOFFREY BALLET SCHOOL,  
JOFFREY BALLET CENTER, INC. d/b/a  
JOFFREY BALLET SCHOOL and CHRISTOPHER  
D'ADDARIO,

Defendants.

-----x

**DORIS LING-COHAN, J.:**

Defendants move, pursuant to CPLR 3211 (a) (1) and (7), to dismiss the complaint. Plaintiff cross-moves, pursuant to CPLR 3025 (b), for leave to amend the complaint to add Center for American Dance, Inc. as an additional defendant.

**BACKGROUND**

According to the complaint, on January 4, 2010, defendants hired plaintiff to set up and implement certain summer programs for their students and to help rewrite certain policies, procedures and practices. Motion, Ex. A. On January 6, 2010, defendant Christopher D'Addario (D'Addario), the Joffrey Ballet School's executive director, thanked plaintiff in writing for her work. Complaint, ¶ 24. Plaintiff alleges that defendants owe her \$2,000.00 for this work. *Id.* ¶ 25.

On January 25, 2010, D'Addario sent plaintiff an e-mail

indicating that defendants had a job offer for her for part-time work, and plaintiff accepted the offer and began such employment on February 5, 2010. *Id.*, ¶¶ 26-27. Plaintiff's initial task was to begin finding, booking and scheduling activities for the Joffrey Ballet School New York City (2010) Summer Intensive Program, for which plaintiff was paid \$2,000.00. *Id.*, ¶¶ 30-31. Plaintiff alleges that, in addition to this work, defendants asked her to perform additional duties, for which defendants agreed, in writing, to pay her \$175.00 per activity that actually occurred, unless the activity was an outdoor event exceeding 200 students, in which case plaintiff was to be paid \$200.00 per event. *Id.*, ¶¶ 34-35. According to plaintiff, 25 such events took place, for which plaintiff contends defendants owe her \$4,375.00. *Id.*, ¶¶ 37-38.

The complaint also alleges that defendants asked plaintiff to perform similar duties for their Miami summer program. Plaintiff asserts that she did perform such duties, for which defendants owe her the sum of \$ 1,800.00. *Id.*, ¶¶ 39-44.

On or about April 18, 2010, defendants began discussing hiring plaintiff on a full-time basis, and plaintiff accepted such employment on April 19, 2010, on an "at-will" basis, pursuant to a six-month contract at a salary of \$60,000.00 per year. *Id.*, ¶¶ 45-51. Plaintiff states that, on November 15, 2010, prior to the expiration of her contract, defendants

unilaterally cut her pay by five percent, without prior notice, and, on December 27, 2010, one month after the expiration of her contract, defendants terminated plaintiff's employ. *Id.*, ¶¶ 54-55. Plaintiff avers that she made a written demand for payment of her unused vacation and sick/personal days, personal disbursements she made on behalf of defendants, plus the five percent contract differential, but that defendants never responded.

The complaint asserts three causes of action: (1) unpaid wages and disbursements under New York State Labor Law and the federal Fair Labor Standards Act; (2) breach of contract; and (3) unjust enrichment.

The contract that forms the basis of this litigation was entered into by plaintiff and Center for American Dance, Inc. d/b/a Joffrey Ballet School, signed by plaintiff and D'Addario as Executive Director, and states, in pertinent part:

"the parties intend to create and enter into an 'employment-at-will' relationship . . . . Joffrey makes no warranties or representations with regard to the duration of the engagement of [plaintiff].

1. Employment.

a. [Plaintiff] is hereby employed as Associate Executive Director of Joffrey for a six (6) month trial period commencing on the date hereof and continuing till November 27<sup>th</sup>, 2010. [Plaintiff] is also subject to the termination provisions herein. The Employer has the option to renew for one (1) year after the trial period has concluded on November 27<sup>th</sup>, 2010. The Employer must submit in writing to [plaintiff] the option to renew within 30 days of trial period conclusion. If submission is not made the contract reverts to a non-contract employment

period.

2. Compensation and Benefits.

a. Joffrey shall pay [plaintiff] an annual salary of sixty thousand dollars (\$60,000), with such increases as may be determined by Joffrey in its discretion ("Base Salary"). The Base Salary of [plaintiff] shall not be decreased at any time during the term of this Agreement from the amount then in effect, unless [plaintiff] otherwise agrees in writing. ...

b. [Plaintiff] is entitled to two (2) week(s) paid vacation per six months consisting of 10 business days. [Plaintiff] is entitled to ten (10) personal/sick days of paid leave in the same time period. ...

g. Joffrey reserves the right to alter the compensation or benefits referred to hereinabove upon providing thirty (30) days written notice to [plaintiff].

4. Termination

a. Joffrey may terminate this Agreement at any time, with or without cause. There being no method by which [plaintiff] may challenge his termination, in the event Joffrey terminates [plaintiff], [plaintiff] shall be entitled to two weeks severance pay, including all salary and benefits to which [plaintiff] would otherwise be entitled ...

c. [Plaintiff] shall only be paid for time worked.

10. Legal Fees and Costs. In the event that either party elects to incur legal expenses to enforce or interpret any provision of this Agreement, each party shall be responsible for its own legal expenses, including, but not limited to, reasonable attorney's fees, costs, and necessary disbursements.

15. Understood and Acknowledged. Both parties have fully reviewed this Agreement and any attached agreements. All terms and provisions are fully understood by both parties and the obligations and responsibilities imposed by this Agreement and any attached agreements are entered into with full acknowledgement."

Motion, Ex. B.

Defendants argue that the complaint must be dismissed because there is no privity between plaintiff and any of the

named defendants. The contract entered into by plaintiff was with Center for American Dance, Inc. d/b/a Joffrey Ballet School, not with the other named defendants. Motion, Ex. B. Further, the complaint fails to allege that plaintiff was employed by D'Addario individually or that D'Addario signed the contract other than in his representative capacity, which is clearly indicated in the contract.

In opposition to the instant motion, and in support of her own motion, plaintiff points out that, whereas the caption does not name Center for American Dance, Inc., several paragraphs in the body of the complaint do name that entity. Further, plaintiff has attached a copy of Form 1099 sent to her for work performed, indicating the payer's name as "Joffrey Ballet Center for American Dance," one of the named defendants. Moreover, plaintiff seeks leave to serve and file an amended complaint "which will consist solely of the addition of a new defendant", Center for American Dance, Inc. Aff. in Support; Cross Motion, ¶¶ 24-26.

Plaintiff also contends that D'Addario has a practice of using the named corporations to his own advantage, not strictly as corporate entities, which subjects him to personal liability. Plaintiff states that several of the functions that she performed were performed at D'Addario's request and were not part of the written contract.

In reply, defendants state that plaintiff fails to show any privity between her and Joffrey Ballet Center for American Dance, Inc. d/b/a Joffrey Ballet, except for the one Form 1099, which, defendants assert, is insufficient to maintain an action against that entity. Further, defendants say that plaintiff does not demonstrate any connection between her and Joffrey Ballet Center, Inc. d/b/a Joffrey Ballet School.

Defendants also argue that the employment contract clearly identifies plaintiff as an executive, thereby rendering her exempt from the federal and state laws noted in the complaint.

Lastly, defendants contend that the complaint, as well as the proposed amended complaint, fails to allege any claim against D'Addario individually or allege any facts that would warrant a theory of piercing the corporate veil.

Based on these arguments, defendants say that plaintiff's cross motion should be denied because the underlying causes of action cannot be maintained.

#### **DISCUSSION**

First, the court will address plaintiff's cross motion for leave to amend her pleadings.

CPLR 3025 (b) provides that

"[a] party may amend his or her pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just including the granting of costs and continuances."



As stated in *Seidman v Industrial Recycling Properties, Inc.* (83 AD3d 1040, 1040-1041 [2d Dept 2011]):

"Leave to amend a pleading pursuant to CPLR 3025 (b) should be freely granted unless the proposed amendment is palpably insufficient or patently devoid of merit, or unless prejudice or surprise to the opposing party results directly from the delay in seeking leave to amend."

The court grants plaintiff's cross motion for leave to serve and file an amended complaint in the form annexed to her moving papers. Defendants have failed to argue that such leave would unduly prejudice them or that the addition of the party named in the contract that forms the basis of this litigation is devoid of merit. Defendants' only argument goes to the underlying claims, not the addition of a new party, which is the only amendment sought.

The court will now address the main motion.

CPLR 3211 (a), "Motion to dismiss cause of action," states that:

"[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that:

- (1) a defense is founded upon documentary evidence; or
- (7) the pleading fails to state a cause of action; ..."

To defeat a pre-answer motion to dismiss made pursuant to CPLR 3211, the opposing party need only assert facts of an evidentiary nature which fit within any cognizable legal theory (*Bonnie & Co. Fashions v Bankers Trust Co.*, 262 AD2d 188 [1<sup>st</sup> Dept

1999))(internal citations omitted). Further, the movant has the burden of demonstrating that, based upon the four corners of the complaint liberally construed in favor of the plaintiff, the pleading states no legally cognizable cause of action (*Guggenheimer v Ginzburg*, 43 NY2d 268 [1977]; *Salles v Chase Manhattan Bank*, 300 AD2d 226 [1<sup>st</sup> Dept 2002]).

That portion of defendants' motion seeking to dismiss the complaint asserted as against Joffrey Ballet Center, Inc. d/b/a Joffrey Ballet School is granted. Based upon the documentary evidence, defendants have established that there is no cause of action as against Joffrey Ballet Center, Inc. d/b/a Joffrey Ballet School, as they are not a party to the contract.

That portion of defendants' motion seeking to dismiss the complaint asserted as against Joffrey Ballet Center for American Dance, Inc. d/b/a Joffrey Ballet is denied. The Form 1099 provided by plaintiff indicating that this entity paid her for some of the work that she performed is sufficient, at this early juncture, to warrant having that entity remain in the action.

That portion of defendants' motion seeking to dismiss the complaint asserted as against D'Addario is granted. Neither the complaint, nor the proposed amended complaint, pleads sufficient factual allegations that D'Addario so dominated and controlled the corporation so as to warrant piercing the corporate veil, nor is there any allegation that D'Addario acted other than in his

representative capacity. *East Hampton Union Free School District v Sandpebble Builders, Inc.*, 16 NY3d 775 (2011); *Albstein v Elany Contracting Corp.*, 30 AD3d 210 (1<sup>st</sup> Dept 2006).

That portion of defendants' motion seeking to dismiss plaintiff's third cause of action for unjust enrichment is granted. Both sides agree that there is a valid written contract, and the existence of a valid contract bars a cause of action in quantum meruit. *The Hawthorne Group, LLC v RRE Ventures*, 7 AD3d 320 (1<sup>st</sup> Dept 2004); see also *Sheiffer v Shenkman Capital Mgt.*, 291 AD2d 295 (1<sup>st</sup> Dept 2002).

Lastly, that portion of defendants' motion seeking to dismiss plaintiff's first and second causes of action is denied. Too many factual questions exist at this preliminary stage in the proceedings to warrant dismissal. Moreover, the only arguments presented by defendants in their moving papers, and plaintiff in her opposition and cross motion, concern the parties to the action and D'Addario's role; the first time that any argument was broached relating to the legal theories underlying plaintiff's causes of action appear in defendants' reply memorandum. Arguments advanced for the first time in reply papers are entitled to no consideration by a court considering the merits of a dispositive motion. *Meade v Rock-McGraw, Inc.*, 307 AD2d 156 (1<sup>st</sup> Dept 2003).

**CONCLUSION**

Based on the foregoing, it is hereby

ORDERED that plaintiff's cross motion for leave to amend the complaint herein is granted, and the amended complaint in the proposed form annexed to the cross-moving papers shall be deemed served upon service of a copy of this order with notice of entry upon all parties who have appeared in the action; and it is further

ORDERED that a supplemental summons and amended complaint, in the form annexed to the cross-moving papers, shall be served, in accordance with the Civil Practice Law and Rules, upon the additional parties in this action within 30 days after service of a copy of this order with notice of entry; and it is further

ORDERED that the action shall bear the following caption:

BETH D. BERENBAUM,  
Plaintiff,

Index No.: 108552/11

-against-

JOFFREY BALLET CENTER FOR AMERICAN  
DANCE, INC. d/b/a JOFFREY BALLET SCHOOL,  
and CENTER FOR AMERICAN DANCE, INC.  
d/b/a JOFFREY BALLET SCHOOL

Defendants.

And it is further

ORDERED that counsel for the cross-moving party shall serve a copy of this order with notice of entry upon the County Clerk

(Room 141B) and the Clerk of the Trial Support Office (Room 158), who are directed to mark the court's records to reflect the additional parties; and it is further

ORDERED that the portion of defendants' motion seeking to dismiss the complaint asserted as against Joffrey Ballet Center, Inc. d/b/a Joffrey Ballet School and Christopher D'Addario is granted and the complaint is severed and dismissed as against said defendants; and it is further

ORDERED that the portion of defendants' motion seeking to dismiss plaintiff's third cause of action is granted and said cause of action is dismissed; and it is further

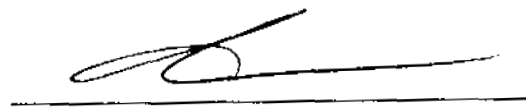
ORDERED that the remainder of defendants' motion is denied; and it is further

ORDERED that defendants shall serve an answer to the amended complaint or otherwise respond thereto within 20 days from the date of said service; and it is further

ORDERED that by separate order a preliminary conference is scheduled.

Dated: 4/13/12

**FILED**  
**APR 17 2012**  
**NEW YORK**  
**COUNTY CLERK'S OFFICE**



Doris Ling-Cohan, J.S.C.