Bondoc v Sklar
2017 NY Slip Op 30058(U)
January 12, 2017
Supreme Court, New York County
Docket Number: 152178/2015
Judge: Saliann Scarpulla

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK: PART 39

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JAY BEE BONDOC, DOREEN CABILLAN, JULIET CULAJAO, JESS IAN GARATE, COLEEN LOPEZ NUNEZ, JOSEPHUS REYNES and IVY SACAY,

Plaintiffs,

-against-

Index No. 152178/2015

NATHAN (a/k/a NOSSAN) REUVEN SKLAR, THE COMPREHENSIVE CENTER, LLC, COMPREHENSIVE KIDS DEVELOPMENT SCHOOL, COMPREHENSIVE STAFFING SOLUTIONS, LLC, LIGAYA AVENIDA, RON LOUIS AVENIDA, JEEPNEE, INC., BADILLA CORPORATION, and AVENIDA INTERNATIONAL CONSULTANTS, INC.,

DECISION AND ORDER

Defendants.

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HON. SALIANN SCARPULLA, J.:

In this action to recover damages for, *inter alia*, breach of contract, defendants Ligaya Avenida, Ron Louis Avenida ("Ron Avenida"), Jeepnee, Inc., and Avenida International Consultants, Inc. ("Avenida International") (collectively "Avenida defendants") move to dismiss the complaint insofar as asserted against them (mot. seq. 001), and defendants Nathan (a/k/a Nossan) Reuven Sklar ("Sklar"), The Comprehensive Center, LLC ("Comprehensive Center"), Comprehensive Kids Development School ("Comprehensive School"), and Comprehensive Staffing Solutions, LLC ("Comprehensive Staffing") (collectively, "Comprehensive defendants") move to dismiss the complaint insofar as asserted against them (mot. seq. 002).

For over ten years, the Avenida defendants have operated Avenida International, a California employment recruiting agency licensed by the Philippine Overseas Employment Administration ("POEA"), to recruit workers from the Philippines for overseas employment in the United States, and to assist those workers with their transition and relocation. Ligaya Avenida and her son Ron Avenida are California residents. Ligaya Avenida was the chief executive officer of Avenida International, a principal of Jeepnee, and a principal of defendant Badilla Corporation. Ron Avenida was an Avenida International employee, and is chief operating officer of Jeepnee, a Delaware corporation maintaining its principal place of business in California. Jeepnee purchased Avenida International, and Jeepnee was dissolved in 2013.

Comprehensive Center is the umbrella company for the corporate Comprehensive defendants, each a New York corporation. Comprehensive Staffing is the recruitment arm of those entities. Comprehensive School is a nursery school and non-profit corporation located in Manhattan. Sklar, a New York resident, is president of both Comprehensive Center and Comprehensive Staffing, and president and executive director of Comprehensive School.

In 2011, the Comprehensive defendants verbally retained the Avenida defendants to recruit special education teachers and speech pathologists in the Philippines to work for Comprehensive School in New York City.

Plaintiffs Jay Bee Bondoc, Doreen Cabillan, Juliet Culajao, Jess Ian Garate, Coleen Lopez Nunez, Josephus Reynes, and Ivy Sacay (collectively referred to as "plaintiffs") commenced this action, alleging that the Avenida defendants and the

Comprehensive defendants breached duties in contract and tort by fraudulently inducing plaintiffs, each a resident of the Philippines, to immigrate to New York with promises of legal full-time employment. Plaintiffs alleged that the Avenida defendants breached their promises to assist plaintiffs in obtaining visas that would permit them to work legally as full-time special education teachers and speech pathologists at Comprehensive School, at a yearly salary of at least $45,000 with employment benefits, and to reimburse certain pre-employment expenses, including their visa application fees, teaching license fees, and immigration expenses, upon their arrival in New York. Plaintiffs alleged that as a result of defendants' improper conduct, plaintiffs incurred economic losses, and were stranded in the United States, in significant debt and with poor employment prospects. Plaintiffs claimed that they had no choice but to accept part-time employment by the Comprehensive defendants as aides, rather than professionals, and at minimum wage.

According to plaintiffs, in May 2011, the Avenida defendants approached plaintiffs in the Phillipines, holding themselves out as experts in placing people from the Philippines in teaching positions in the United States, and in providing them with guidance and assistance in obtaining the appropriate visas and required teaching licenses and credentials. The Avenida defendants then arranged for an interview for each plaintiff with Sklar, and, on June 3, 2011, plaintiffs attended an orientation meeting with Ligaya Avenida, Ron Avenida, and Sklar, allegedly held in the Philippines.

At that meeting, Sklar, on behalf of the Comprehensive defendants, offered each plaintiff a full-time teaching position with a three-year term, at a yearly salary of approximately $45,000, together with employment benefits, effective October 1, 2011.

In addition, plaintiffs alleged that, at that meeting, Sklar, on behalf of the Comprehensive defendants, repeatedly verbally represented to plaintiffs that, upon plaintiffs' arrival in New York, the Comprehensive defendants would reimburse unconditionally each plaintiff for the pre-employment expenses that each incurred, including fees paid in connection with obtaining New York State teaching licenses and visa-related expenses.

At that meeting, each plaintiff and Sklar, as president of Comprehensive Staffing, executed a written employment agreement ("Comprehensive employment agreement") memorializing the terms of employment. In relevant part, each Comprehensive employment agreement requires each plaintiff to obtain a visa issued pursuant to 8 USC § 1101 (a) (15) (H) (i) (b) ("H-1B visa"), and immigrate to New York City, as a condition of employment. Each agreement obligates Comprehensive Staffing to file a visa petition on behalf of each plaintiff.

Plaintiffs maintained that the Avenida defendants, as agents for the Comprehensive defendants, repeated the Comprehensive defendants' offers of legal full-time employment and unconditional reimbursement of pre-employment expenses, upon plaintiffs' arrival in New York. In addition, plaintiffs alleged that Ligaya Avenida represented to them that the Avenida defendants would guide and assist each plaintiff in obtaining an H-1B visa, which would permit each plaintiff to work in the teaching positions specified in the Comprehensive employment agreements.

An H-1B visa permits a foreign worker to be employed in a specialty occupation by a United States business. Before gaining entry into the United States on an H-1B visa,

the applicant must demonstrate that he or she has obtained all state or local licenses necessary for employment in the United States (*see* 8 CFR 214.2 [h] [4] [v] [A] ["If an occupation requires a state or local license for an individual to fully perform the duties of the occupation, an alien . . . seeking H classification in that occupation must have that license prior to approval of the petition to be found qualified to enter the United States and immediately engage in employment in the occupation"]).

At the orientation meeting, the Avenida defendants provided each plaintiff with a written fee schedule ("Avenida fee agreement") itemizing the fees and expenses that each plaintiff would incur in applying for a visa. Pursuant to each Avenida fee agreement, each plaintiff hired the Avenida defendants to assist with his or her immigration to the United States from the Philippines, including the submission of visa and state licensure applications, in exchange for a total payment of $10,410 apiece.

The Avenida defendants subsequently verbally hired nonparty Law Office of Indu Liliadhar-Hathi, a California-based immigration law firm, to file an H-1B visa application on behalf of each plaintiff in October 2011.

Problems arose in connection with plaintiffs' licensing and H-1B visa applications. The New York State Department of Education ("DOE") allegedly refused to approve plaintiffs' teaching license applications on the ground that plaintiffs had not completed the pre-requisites, including taking, and passing, the New York State Teacher Certification Examinations ("TC exams") in New York. Allegedly, without passing the TC exams, plaintiffs could not obtain an H-1B visa, but might be able to obtain visas issued pursuant to 8 USC § 1101 (a) (15) (J) ("J-1 visa").

Plaintiffs alleged that the Comprehensive defendants and the Avenida defendants, acting together, coerced plaintiffs into applying for a J-1 visa, rather than an H-1B visa. Plaintiffs claimed that, as part of the fraudulent scheme, Ligaya Avenida communicated to plaintiffs an alleged threat by Sklar that the Comprehensive defendants would not reimburse plaintiffs for their pre-employment expenses, if they pursued H-1B visas.

By identical emails sent January 24, 2012, Ligaya Avenida advised each plaintiff that J-1 visa applications are generally processed more quickly than H-1B visa applications, and would permit plaintiffs to travel to New York to take the TC exams. She further advised plaintiffs that the J-1 visa requires the holder to return home after three years in the United States, and that they would be able to apply for an H-1B visa at that time.

In those emails, Ligaya Avenida also advised each plaintiff that each could either proceed and apply for a J-1 visa, or stop the visa process, and receive a partial refund of costs and fees paid, pursuant to the terms of the Avenida fee agreements and POEA regulations. Ligaya Avenida also wrote, "[p]lease remember, that Mr. Sklar and [Comprehensive Staffing] will be reimbursing you for the cost of licensure & visa processing, upon your arrival in the US. However, if you decline to be processed under the J[-]1 visa, you WILL NOT BE ELIGIBLE FOR THE REIMBURSEMENT FROM [COMPREHENSIVE STAFFING]."

Plaintiffs agreed to apply for J-1 visas. Plaintiffs alleged that, when they agreed, they did not know that the J-1 visa program, unlike the H-1B visa program, does not require the United States employer to reimburse the holder's immigration expenses, and

that it does require the holder to work at a primary or secondary school (*see* 8 USC § 1101 [a] [15] [J]). Plaintiffs claimed that they did not know, at that time, that a J-1 visa would not enable plaintiffs to lawfully accept the contractually agreed upon employment because the Comprehensive School was a preschool, and not a primary or secondary school.

Plaintiffs further maintained that given the Avenida defendants' experience in relocating Filipinos to the United States and the terms of a memorandum of understanding ("MOU") between them and the Comprehensive defendants, the Avenida defendants knew that the Comprehensive defendants would not be required to reimburse any plaintiff his or her immigration expenses, until that plaintiff had worked a total of 1,000 hours for them.[1]

According to plaintiffs, on their H-1B visa applications submitted to the United States Citizenship and Immigration Services ("USCIS") by the Comprehensive defendants, Sklar represented that each plaintiff would be employed by Comprehensive Staffing in a preschool position, legal employment under the H-1B visa program, but not under the J-1 visa program.

On the Confirmation of Appointment for International Exchange Teachers ("Confirmation of Appointment") and the International Teacher Exchange Services J-Visa Sponsorship Agreement ("Sponsorship Agreement") submitted for each plaintiff to the International Teacher Exchange Services ("ITES") by the Comprehensive defendants

[1] The MOU has not been submitted into evidence.

on March 3, 2012, Sklar allegedly intentionally misrepresented that each plaintiff would be employed by Comprehensive School in a kindergarten position, which is legal employment under a J-1 visa. Each plaintiff and Sklar, as president of Comprehensive School, executed each of these documents.

Plaintiffs received J-1 visas, with the exception of Jess Ian Garate, who received an H-1B visa, and the plaintiffs traveled to New York in April 2012, allegedly leaving behind gainful employment and family in the Philippines in reliance on defendants' contractual agreement to arrange legal, full-time employment by the Comprehensive defendants.

On April 13, 2012, plaintiffs attended an orientation meeting at the New York offices of the Comprehensive defendants. Plaintiffs alleged that they were compelled to accept employment at the Comprehensive School as paraprofessionals, working five to six hours a day, at a rate of $10 an hour, earning far less than the minimum yearly salaries specified in the Comprehensive employment agreements. Plaintiffs claimed that the Comprehensive defendants did not pay them for holidays, sick days, or vacation days.

Plaintiffs took the TC exams, and, eventually, each allegedly obtained a New York State teaching license.

According to plaintiffs, the Comprehensive defendants refused to honor their repeated promises to reimburse plaintiffs for their pre-employment licensure and visa applications expenses upon plaintiffs' arrival in the United States, and upon receiving their teaching licenses, and refused to employ them as full-time teachers, with a minimum $45,000 annual salary and employment benefits for a three-year term.

In this action, plaintiffs asserted causes of action against the Comprehensive defendants for (1) violations of Labor Law § 198-b by taking improper deductions from their wages; and (2) breach of the Comprehensive employment agreements, Confirmations of Appointment, and Sponsorship Agreement and breach of the implied contractual duties of good faith and fair dealing, by failing to provide full-time employment and employment that complied with the terms of their visas, failing to pay agreed upon salaries, and failing to provide employment benefits, including medical insurance.

Against the Avenida defendants, plaintiffs asserted claims for breach of the express and implied terms of the oral agreement and the Avenida fee agreements, by failing to secure visas and legal employment for each plaintiff, and by failing to secure visas that would enable each plaintiff to work as a full-time special education teacher or speech language pathologist employed by the Comprehensive School.

Against all defendants, plaintiffs asserted claims for promissory estoppel, fraud, conspiracy to commit fraud, and negligent misrepresentation in connection with defendants' alleged misconduct in failing to pay plaintiffs a yearly salary and benefits, and to reimburse plaintiffs their pre-employment costs and expenses.

Discussion

The Avenida Defendants' Motion

The Avenida defendants now move to dismiss the complaint insofar as asserted against them. They first argue that they are not subject to personal jurisdiction in New York. In opposition, plaintiffs contend that this court may properly exercise long-arm

jurisdiction over the Avenida defendants through their contractual relationship with the Comprehensive defendants in New York, and because they committed tortious acts that injured plaintiffs in New York.

On a motion to dismiss for lack of personal jurisdiction, the plaintiff bears the burden of demonstrating satisfaction of the statutory and due process prerequisites. *Stewart v. Volkswagen of Am.*, 81 N.Y.2d 203, 207 (1993). Where the defendant is a nondomiciliary, the plaintiff must allege facts sufficient to satisfy the relevant statutory requirements, and to warrant a finding of long-arm jurisdiction over the defendant. *See generally PT. Bank Mizuho Indonesia v. PT. Indah Kiat Pulp & Paper Corp.*, 25 A.D.3d 470, 470-471 (1st Dept. 2006).

Section 302 of the CPLR permits a court to exercise long-arm jurisdiction over a nondomiciliary who transacts business within the state, in certain circumstances. Subsection 302(a)(1) requires that the defendant conduct purposeful activity within the state, and that there be a substantial relationship between that activity and the plaintiff's claim. "It is a 'single act statute' and proof of one transaction in New York is sufficient to invoke jurisdiction, even though the defendant never enters New York, so long as the defendant's activities here were purposeful and there is a substantial relationship between the transaction and the claim asserted." *Kreutter v. McFadden Oil Corp.*, 71 N.Y.2d 460, 467 (1988); *see Ehrenfeld v. Bin Mahfouz*, 9 N.Y.3d 501, 508 (2007); CPLR 302 (a)(1).

"To determine whether a party has 'transacted business' in New York, courts must look at the totality of circumstances concerning the party's interactions with, and activities within, the state." *Scheuer v. Schwartz*, 42 A.D.3d 314, 316 (1st Dept. 2007)

quoting Bank Brussels Lambert v. Fiddler Gonzalez & Rodriguez, 171 F.3d 779, 787 (2nd Cir. 1999). The "overriding criterion necessary to establish a transaction of business is some act by which the defendant purposefully avails itself of the privilege of conducting activities within" New York. *Ehrenfeld v. Bin Mahfouz*, 9 N.Y.3d at 508 (internal quotation marks and citation omitted).

The exercise of long-arm jurisdiction over the Avenida defendants, each a foreign domiciliary, is warranted in the circumstances presented here.

It is undisputed that the Avenida defendants were retained by the Comprehensive defendants, each a New York corporation or domiciliary, to recruit foreign persons for employment as New York licensed special education teachers and speech pathologists in New York. For more than a year, the Avenida defendants admittedly worked with the Comprehensive defendants to facilitate plaintiffs' relocation to, and employment in, New York, including rendering assistance and advice regarding the appropriate United States visa, the visa application procedure, and the New York State teacher licensing application and testing procedures, and coordinating plaintiffs' transportation to, and housing in, New York. In her January 2012 email to each plaintiff, Ligaya Avenida, on behalf of the Avenida defendants, refers to her contact with, and receipt of information from, the New York DOE regarding the New York licensing requirements for teachers. In that email, she interprets that information and requirements. She also refers to communications with Sklar regarding plaintiffs' visa and employment options, and passes along to plaintiffs Sklar's thoughts on those matters.

These contacts constitute purposeful minimum contacts with New York such that the Avenida defendants could have reasonably anticipated that they might be called to defend a lawsuit here. In addition, these contacts underlie plaintiffs' contract and tort claims against the Avenida defendants. Therefore, the statutory requirements for the exercise of long-arm jurisdiction and due process considerations are satisfied.

Next, the Avenida defendants contend that the complaint fails to state any viable cause of action in contract or tort against them. In opposition, plaintiffs contend that the Avenida affidavits should be rejected as self-serving and without basis in relevant fact, and, in the alternative, they merely raise triable issues of fact.

On a motion to dismiss, affidavits "are not to be examined for the purpose of determining whether there is evidentiary support for the pleading." *Rovello v. Orofino Realty Co.*, 40 N.Y.2d 633, 635 (1976). Affidavits that "do no more than assert the inaccuracy of plaintiffs' allegations" should not be considered in determining whether there is evidentiary support for the complaint. *Tsimerman v. Janoff*, 40 A.D.3d 242, 242 (1st Dept. 2007). Here, to the extent that the affidavits submitted on behalf of the Avenida defendants set forth legal argument and authenticate objective documentary evidence, they may be considered by the court.

To state a legally viable claim for breach of contract, the plaintiff must allege the existence of a contract between the plaintiff and the defendant, the plaintiff's performance of the contract, the defendant's breach of its contractual obligations, and damages arising out of that breach. *Dee v. Rakower*, 112 A.D.3d 204, 208-209 (2nd Dept. 2013); *Furia v. Furia*, 116 A.D.2d 694, 695 (2nd Dept. 1986).

The implied covenants of good faith and fair dealing impose obligations consistent with the mutually agreed-upon terms in the contract, and cannot be used to add substantive provisions that were not included by the parties to the contract. *Sabetay v. Sterling Drug*, 69 N.Y.2d 329, 335-336 (1987). The implied covenants may not be used as a substitute for a nonviable breach of contract claim. *Jordan Panel Sys. Corp. v. Turner Constr. Co.*, 45 A.D.3d 165, 180 (1st Dept. 2007).

In the breach of contract claim, plaintiffs allege that the Avenida defendants breached the express provisions and implied covenants in the oral contracts between the Avenida defendants and each plaintiff, and the Avenida fee agreement, by failing to secure visas that would allow plaintiffs to work as special education teachers or speech pathologists for the Comprehensive defendants, in accordance with the Comprehensive employment agreement, and by failing to secure employment that complied with the terms of the visas that they got. Plaintiffs further allege that they fully performed their contractual duties by paying the fee required by the Avenida fee schedule, applying for H-1B and J-1 visas, entering New York, taking the TC exams, and agreeing to accept employment with the Comprehensive defendants. They also allege that, as a result of the Avenida defendants' breaches, plaintiffs incurred significant debt, together with other damages.

Whether the Avenida defendants actually fulfilled their contractual obligations is not an appropriate issue to be resolved on a motion to dismiss, which is addressed to the sufficiency of the pleadings. *See Goodale v. Central Suffolk Hosp.*, 126 A.D.3d 671, 672 (2nd Dept. 2015). Here, the breach of contract claim was sufficiently pled.

The Avenida defendants' arguments that they fulfilled their obligations imposed by the Avenida fee agreements, and that those agreements include a "no refund" clause are not dispositive. The breach of contract claim arises primarily out of an alleged oral agreement, not the written Avenida fee agreements. Therefore, that branch of the Avenida defendants' motion to dismiss the breach of contract claim asserted against them is denied.

However, the branch of the third cause of action for promissory estoppel asserted against the Avenida defendants must be dismissed.

"To establish a claim for promissory estoppel, a plaintiff must allege (1) a clear and unambiguous promise, (2) reasonable and foreseeable reliance by the party to whom the promise is made, and (3) an injury sustained in reliance on the promise." *Sabre Intl. Sec., Ltd. v. Vulcan Capital Mgt., Inc.*, 95 A.D.3d 434, 439 (1st Dept. 2012)(internal quotation marks and citation omitted).

In the promissory estoppel claim, plaintiffs allege that the Avenida defendants, through Ligaya Avenida, promised them that they would secure visas for each plaintiff, and full-time employment with the Comprehensive defendants that would comply with the terms of the visas, and that the Comprehensive defendants would reimburse them their visa and licensure expenses, upon their arrival in New York City. Plaintiffs further allege that the Avenida defendants promised that the Comprehensive defendants would pay each plaintiff a yearly salary equal to $45,000 for a three-year term, together with employment benefits, and that they were not eligible for H-1B visas. Plaintiffs allege that

these promises were made in Ligaya Avenida's January 2012 email and during the first orientation meeting. Plaintiffs allege that the Avenida defendants made these promises in order to induce them to reasonably rely on the Avenida defendants, to coerce them to leave their homes and employment in the Philippines, and to coerce them to pursue J-1 visas, which did not grant them the rights that they would have had, had they obtained H-1B visas.

These allegations are identical in all respects to the allegations underlying the breach of an oral contract claim. Significantly, plaintiffs have failed to allege any facts that might support a finding of a duty toward plaintiffs independent of the express duties and implied covenants alleged to exist in the oral contracts between the Avenida defendants and each plaintiff. A claim for promissory estoppel that is duplicative of a breach of contract claim cannot survive a motion to dismiss, in the absence of a duty independent of the contract. *Celle v. Barclays Bank P.L.C.*, 48 A.D.3d 301, 303 (1st Dept. 2008). Therefore, that branch of the Avenida defendants' motion to dismiss the promissory estoppel claim asserted against them is granted, and that claim is dismissed.

Similarly, the fourth, fifth, and sixth claims for fraud, conspiracy to commit fraud, and negligent misrepresentation asserted against the Avenida defendants are dismissed on the grounds that they arise solely out of the alleged contractual relationship between those defendants and plaintiffs, and that plaintiffs cannot demonstrate reasonable reliance. Tort claims will be dismissed where all potential "liability has its genesis in the

parties' contractual relationship." *Middle Country Cent. Sch. Dist. v. O'Healy Constr. Corp.*, 230 A.D.2d 777, 778 (2nd Dept. 1996).

In the fraud claims, plaintiffs repeat the factual allegations underlying the contract claim, and seek to recover the same damages, the benefit of their bargain. They fail to allege facts which, if proven, would substantiate a finding of a duty owed them independent of the express and implied duties arising under their alleged oral contracts with the Avenida defendants. "While . . . the same acts which give rise to a cause of action for fraud may also form the basis for a breach of contract claim, a cause of action for fraud will not arise if the alleged fraud merely relates to the breach of contract." *MBW Adv. Network v. Century Bus. Credit Corp.*, 173 A.D.2d 306, 306 (1st Dept. 1991)(internal citation omitted). "It is well settled that a cause of action for fraud does not arise where . . . the only fraud alleged merely relates to a contracting party's alleged intent to breach a contractual obligation." *Caniglia v. Chicago Tribune-N.Y. News Syndicate*, 204 A.D.2d 233, 234 (1st Dept. 1994). To be legally viable, a fraud claim must arise out of a duty to the plaintiff separate and apart from any contractual duty. *Clark-Fitzpatrick, Inc. v. Long Is. R.R. Co.*, 70 N.Y.2d 382, 389 (1987). Plaintiffs' attempt to recast the contract claim as fraud claims is unsuccessful.

The claim for conspiracy to commit fraud is also fatally defective on the ground that New York does not recognize civil conspiracy as an independent cause of action. *Alexander & Alexander of N.Y. v. Fritzen*, 68 N.Y.2d 968, 969 (1986). Such a claim is permissible only for the limited purpose of connecting "actions of separate defendants

with an otherwise actionable tort." *Snyder v. Puente De Brooklyn Realty Corp.*, 297 A.D.2d 432, 435 (3rd Dept. 2002)(internal quotation marks and citations omitted). As discussed above, the primary fraud claim asserted against the Avenida defendants is not legally viable; therefore, the conspiracy to commit fraud must also be dismissed.

Next, the branches of the Avenida defendants' motion to dismiss all contract, quasi contract, and tort claims asserted against Ligaya Avenida and Ron Avenida in their individual capacities are granted.

Generally, "an officer or director of a corporation is not personally liable to one who has contracted with the corporation on a theory of inducing a breach of contract, merely due to the fact that, while acting for the corporation, he has made decisions and taken steps that resulted in the corporation's promise being broken." *Matter of Brookside Mills (Raybrook Textile Corp.)*, 276 App. Div. 357, 367 (1st Dept. 1950). "[A]n agent for a disclosed principal will not be personally bound unless there is clear and explicit evidence of the agent's intention to substitute or superadd his personal liability for, or to, that of his principal." *Worthy v. New York City Hous. Auth.*, 21 A.D.3d 284, 286 (1st Dept. 2005)(internal quotation marks and citations omitted).

In the complaint, plaintiffs do not allege any facts that might be interpreted as evidencing an intent by Ligaya Avenida or Ron Avenida to be personally bound on the alleged oral contract or the Avenida fee agreement. Plaintiffs do not allege any facts that might indicate that Ligaya Avenida or Ron Avenida exercised complete dominion and control over the corporate Avenida defendants.

The Comprehensive Defendants' Motion

In the next motion, the Comprehensive defendants seek to dismiss the Labor Law, contract, quasi contract, and tort claims asserted against them on the ground that they fail to state legally cognizable causes of action.

First, Section 198-b of the Labor Law is not applicable in the circumstances presented here. The section is known as the "anti-kickback" statute, and prohibits employers from requesting or demanding that employees return a portion of their salary. *Martinez v. Alubon, Ltd.*, 111 A.D.3d 500, 501 (1st Dept. 2013); *see* Labor Law § 198-b(2).

Plaintiffs do not allege that the Comprehensive defendants demanded a kickback or received one, or made improper deductions from earned wages or commissions, rather, they allege that the Comprehensive defendants failed to employ plaintiffs, pay them a salary, provide them with employment benefits, and reimburse them for certain pre-employment expenses and fees. Therefore, the claim must be dismissed. *See Martinez v Alubon, Ltd.*, 111 A.D.3d at 501.

Further, contrary to plaintiffs' contention, Labor Law §193 is not applicable here. That section prohibits an employer from taking deductions from an employee's wages, unless certain conditions are met. Here, plaintiffs do not allege that the Comprehensive defendants deducted funds from their wages, rather, they allege that the Comprehensive defendants failed to pay them minimum hourly wages because they failed to reimburse them for certain pre-employment expenses. A failure to reimburse is not a deduction. "A

'deduction' literally is an act of taking away or subtraction." *Matter of Angello v. Labor Ready, Inc.*, 7 N.Y.3d 579, 584 (2006). Therefore, the branch of the Comprehensive defendants' motion to dismiss the Labor Law claim is granted.

The Comprehensive defendants next contend that the branch of the second cause of action for breach of contract asserted against them is defective on a variety of grounds, including that plaintiffs have failed to identify the contract provisions allegedly breached, and that their failure to obtain H-1B visas constitutes a failure to perform a condition precedent to the Comprehensive defendants' contractual obligations. In opposition, plaintiffs contend that they fully performed their contractual obligations.

In the breach of contract claim asserted against the Comprehensive defendants, plaintiffs allege that the Comprehensive defendants breached the Comprehensive employment contracts, Confirmations of Appointment, and Sponsorship Agreements by failing to provide plaintiffs with full-time employment and employment benefits in compliance with the terms of the agreements and J-1 visas, failing to pay them salaries of at least $45,000 a year, and failing to provide them with employment benefits, including medical insurance.

To state a legally viable claim for breach of contract, a plaintiff must allege the existence of a valid agreement, the plaintiff's performance, the defendant's failure to perform, and that the plaintiff suffered damages as a result. *VisionChina Media Inc. v. Shareholder Representative Servs., LLC*, 109 A.D.3d 49, 58 (1st Dept. 2013). The plaintiff must also identify or set forth the terms of the agreement upon which liability is

predicated, either by express reference or by attaching a copy of the agreement. *Chrysler Capital Corp. v. Hilltop Egg Farms, Inc.*, 129 A.D.2d 927, 928 (3d Dept. 1987).

During the pendency of these motions, plaintiffs have produced copies of the Comprehensive employment agreements, Confirmations of Appointment, and Sponsorship Agreements. These agreements are form agreements, identical in all relevant respects. Sklar, as president of the Comprehensive School, and each plaintiff executed each of type of agreement.

Plaintiffs have sufficiently pled the express material contract terms allegedly breached by the Comprehensive defendants and alleged that they failed to employ them as teachers and speech pathologists for a three-year term at a salary of $45,000 and employment benefits, and failed to reimburse them for certain pre-employment expenses. Plaintiffs have sufficiently alleged that the Comprehensive defendants bore a duty of good faith and fair dealing in connection with all three contracts, and that they breached that duty when they advised plaintiffs to apply for J-1 visas, instead of H-1B visas, causing plaintiffs to incur substantial financial harm.

Plaintiffs' admitted failure to obtain an H-1B visa does not constitute grounds for dismissal of the contract claim. In relevant part, each Comprehensive employment agreement provides that "[s]ubject to the provision for terms set forth below, the term of the Employee's employment will begin upon approval of the Immigrant/H1-B petition filed by the employer." There is no dispute that, with the exception of Jess Ian Garate, none of the plaintiffs received H-1B visas.

However, plaintiffs sufficiently allege that the Comprehensive defendants coerced them into withdrawing their H-1B visa applications, and submitting J-1 visa applications instead, and intentionally and purposefully prevented plaintiffs from fulfilling their duties arising under the Comprehensive employment agreements. The J-1 visa Confirmations of Appointment and J-1 visa Sponsorship Agreements were executed by plaintiffs and the Comprehensive School, and, thus, evidence the Comprehensive defendants' knowledge and agreement that plaintiffs would apply for J-1 visas, rather than H-1B visas pre-requisite set forth in the Comprehensive employment agreements. "[I]n every contract there is an implied undertaking on the part of each party that he will not intentionally and purposely do anything to prevent the other party from carrying out the agreement on his part." *Grad v. Roberts*, 14 N.Y.2d 70, 75 (1964). Therefore, at this juncture, it is not appropriate to render a decision enforcing the H-1B visa condition precedent provision and the merger provision.

As such, that branch of the Comprehensive defendants' motion to dismiss the branches of the contract claim asserted against them is denied.

The Comprehensive defendants next contend that the branch of the third cause of action for promissory estoppel asserted against them must be dismissed on the ground that it is duplicative of the breach of contract claim.

As discussed above, a claim for promissory estoppel cannot stand when there is a contract between the parties. *See Susman v. Commerzbank Capital Mkts. Corp.*, 95 A.D.3d 589, 590 (1st Dept. 2012). Here again, in the promissory estoppel claim asserted

against the Comprehensive defendants, plaintiffs allege the same misconduct, and seek the same damages, as they do in the claim for breach of contract of the Comprehensive employment agreements, Confirmations of Appointment, and Sponsorship Agreements. The alleged facts underlying the promissory estoppel claim fall within the scope of the Comprehensive employment contracts, together with the Confirmations of Appointment and Sponsorship Agreements, whose breach is alleged by plaintiffs. Therefore, the branch of the Comprehensive defendants' motion to dismiss the promissory estoppel claim asserted against them is granted, and that claim is dismissed.

Next, the Comprehensive defendants contend that the branch of the fourth cause of action for fraud asserted against them must be dismissed on the grounds that the claim is duplicative of the contract claim and lacks the specificity required by statute. In opposition, plaintiffs contend that, while, concededly, the fraud claim arises out of some of the same facts as does the contract claim, the fraud claim arises out of a different duty.

To state a legally viable claim of fraud, a plaintiff must allege a representation of a material existing fact, falsity, scienter, deception and injury. *New York Univ. v. Continental Ins. Co.*, 87 N.Y.2d 308, 318 (1995); *Nicosia v. Board of Mgrs. of the Weber House Condominium*, 77 A.D.3d 455, 456 (1st Dept. 2010). "Where a cause of action or defense is based upon misrepresentation, fraud, mistake, willful default, breach of trust, or undue influence, the circumstances constituting the wrong shall be stated in detail." CPLR 3016 (b). The allegations must be sufficiently particularized to give adequate notice to the court and to the parties of the transactions and occurrences intended to be

proved. *See Accurate Copy Serv. of Am., Inc. v. Fisk Bldg. Assoc. L.L.C.*, 72 A.D.3d 456, 456 (1st Dept. 2010).

In the fraud claim, plaintiffs allege that the Comprehensive defendants, directly and through the Avenida defendants, made false representations that they would reimburse plaintiffs for their visa and teaching license expenses, upon their arrival in New York, thereby fraudulently inducing plaintiffs to withdraw the H-1B visa applications and to apply for J-1 visas instead. Plaintiffs also allege that the Comprehensive defendants intentionally fraudulently represented that they would pay plaintiffs $45,000 a year in salary, and employment benefits, for three-year terms. Plaintiffs allege that, as a result, they suffered significant injury, including being stranded in New York without the employment that they had been promised.

Thus, here again, plaintiffs merely restate the breach of contract claim. Plaintiffs do not plead a legal duty to hire or pay a salary and benefits that exists independent of the duties imposed by the Comprehensive employment contracts. Plaintiffs fail to allege facts that might support a finding that a relationship between plaintiffs and the Comprehensive defendants exists which might create a duty in tort, nor is one created by statute. "[W]here a party is merely seeking to enforce its bargain, a tort claim will not lie." *New York Univ. v. Continental Ins. Co.*, 87 N.Y.2d at 316.

Therefore, that branch of the Comprehensive defendants' motion to dismiss the fraud claim asserted against them is granted, and the claim is dismissed.

That branch of the Comprehensive defendants' motion to dismiss the fifth cause of action for conspiracy to commit fraud is granted. "[A] mere conspiracy to commit a [tort] is never of itself a cause of action." *Alexander & Alexander of N.Y. v. Fritzen*, 68 N.Y.2d at 969 (internal quotation marks and citation omitted). Here, the primary claim for fraud is not legally cognizable, and has been dismissed. Therefore, the conspiracy to commit fraud claim is dismissed as well.

Finally, that branch of the Comprehensive defendants' motion to dismiss the branch of the sixth cause of action for negligent misrepresentation asserted against them granted. To state a legally viable claim for negligent misrepresentation, a plaintiff must allege: "(1) the existence of a special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff; (2) that the information was incorrect; and (3) reasonable reliance on the information." *Mandarin Trading Ltd. v. Wildenstein*, 16 N.Y.3d 173, 180 (2011)(internal quotation marks and citation omitted).

Plaintiffs allege that the Comprehensive defendants, through the Avenida defendants, owed a duty to impart accurate employment and visa information to plaintiffs, and that the Avenida defendants breached such duty. However, in that claim, plaintiffs do not allege that the Comprehensive defendants bore a duty in tort toward plaintiffs, that they made any misrepresentations to plaintiffs, or that they breached any such duty. The only relationship pled was a potential agency relationship, with the claim arising out of allegations of misconduct by the Avenida defendants. To the extent that the claim against the Comprehensive defendants is based on an alleged principal/agent

relationship, the claim is fatally defective. As held above, the negligent misrepresentation claim alleged against the Avenida defendants was dismissed.

In addition, to the extent that plaintiffs seek to recover unpaid wages and employment benefits, the negligent misrepresentation claim is duplicative of the breach of contract claim. As held above, plaintiffs fail to allege a duty owed by the Comprehensive defendants to the plaintiffs that is independent from any duty they may owe under the Comprehensive employment agreements, Confirmations of Appointment, and Sponsorship Agreements.

In accordance with the foregoing, it is hereby

ORDERED that motion sequence number 001 by defendants Ligaya Avenida, Ron Louis Avenida, Jeepnee, Inc., and Avenida International Consultants, Inc. to dismiss the complaint is granted to the extent that the branches of the third, fourth, fifth, and sixth causes of action asserted against those defendants, and all claims asserted against defendants Ligaya Avenida, Ron Louis Avenida, as individuals, are dismissed; and it is further

ORDERED that motion sequence number 002 by defendants Nathan Reuven Sklar, the Comprehensive Center, LLC, Comprehensive Kids Development School, and Comprehensive Staffing Solutions, LLC to dismiss the complaint is granted to the extent that the first cause of action and the branches of the third, fourth, fifth, and sixth causes of action asserted against those defendants are dismissed; and it is further

ORDERED that the remaining cause of action is severed and shall continue; and it is further

ORDERED that defendants are directed to serve an answer to the complaint within 20 days after the entry of this decision and order; and it is further

ORDERED that the parties are directed to appear for a preliminary conference in Room 208, at 60 Centre Street, on March 22, 2017 at 2:15 pm.

This constitutes the decision and order of the court.

Dated: January 12, 2017
New York, NY

J.S.C.
HON. SALIANN SCARPULLA