| **Tampi v Nomura Holdings, Inc.** |
| --- |
| 2017 NY Slip Op 31446(U) |
| July 7, 2017 |
| Supreme Court, New York County |
| Docket Number: 153686/2016 |
| Judge: Manuel J. Mendez |
|  |
|  |

# SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ PART 13
*Justice*

GOPAL TAMPI,
Plaintiff,
-against-
NOMURA HOLDINGS, INC., and
NOMURA SECURITIES INTERNATIONAL, INC.,
Defendants.

INDEX NO. 153686/2016
MOTION DATE 05/31/17
MOTION SEQ. NO. 002
MOTION CAL. NO.

The following papers, numbered 1 to 11 were read on these motions to dismiss and cross-motion to extend time to serve the summons and amended complaint.

| | PAPERS NUMBERED |
|---|---|
| Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... | 1 - 3; 4 - 6; 7- 9 |
| Answering Affidavits — Exhibits | 7 - 9 |
| Replying Affidavits | 10, 11 |

**Cross-Motion: X Yes ☐ No**

Upon a reading of the foregoing cited papers, it is Ordered that Defendant Nomura Holdings, Inc.'s (herein "NHI") motion to dismiss the Amended Complaint, is granted. Defendant Nomura Securities International, Inc.'s (herein "NSI") motion to dismiss the Amended Complaint and compel arbitration, is granted. Plaintiff's motion to grant an extension of time to serve the summons and Amended complaint on NHI, is denied.

Plaintiff was employed by NSI pursuant to a letter agreement dated June 11, 2010 (herein "Employment letter", NHI's Moving Papers Ex. C). Plaintiff commenced this action for breach of contract on May 2, 2016. The Complaint alleges that after his employment was terminated the Defendants breached (1) the Award Agreement by failing to pay him the full value of earned deferred compensation in the form of Collared Notional Stock Units (herein "CSUs") or Notional Indexed Units (herein "ANSUs") (collectively herein "Stock Units"), and (2) the severance policy by failing to pay him separation pay.

By an Order dated January 30, 2017 this Court granted former Defendant Nomura Holdings America, Inc.'s motion to dismiss and granted Plaintiff's motion for leave to amend the Complaint to add NSI as a Defendant (NHI Moving Papers Ex. B). The court reasoned that Nomura Holdings America, Inc. was a distinct separate

entity and Plaintiff failed to raise any valid arguments to require piercing the corporate veil as Plaintiff was employed by NSI, not Nomura Holdings America, Inc.

Defendant NHI now moves to dismiss the Amended Complaint pursuant to CPLR §3211[a][1] and [8]. Defendant NSI moves to dismiss the Amended Complaint pursuant to CPLR §3211 [a][1], [5] and [7] and in the alternative, compel arbitration. Plaintiff cross-moves for an extension of time to serve the summons and Amended Complaint on NHI pursuant to CPLR §306-B and opposes both motions.

A motion to dismiss pursuant to CPLR §3211[a][8] applies to lack of jurisdiction over the defendant. Although not specifically plead within the Amended Complaint, nor clarified within Plaintiff's opposition, it appears that Plaintiff is relying on CPLR §301 to establish jurisdiction over Defendant NHI as a result of the NHI "doing business" in New York state. The nature and quality of the corporate activities constituting "doing business" are "not occasionally or casually, but with a fair measure of permanence and continuity" (Lancaster v Colonial Motor Freight Line, Inc., 177 AD2d 152, 581 NYS2d 883 [1st Dept. 1992]). "A foreign corporation is amenable to suit in New York Courts under CPLR §301 if it has engaged in such a continuous and systematic course of doing business here that a finding of its presence in this jurisdiction is warranted. The essential factual inquiry is whether the defendant has a permanent and continuous presence in the state, as opposed to merely occasional or casual contact with the state" (Holness v Maritime Overseas Corp., 251 AD2d 220, 676 NYS2d 540 [1st Dept. 1998]). New York Courts do not have general jurisdiction over a defendant under CPLR §301 if the entity is not incorporated in New York and does not have its principal place of business in New York (Magdalena v Lins, 123 AD3d 600, 999 NYS2d 44 [1st Dept. 2014], *citing* Daimler AG v. Bauman, 134 S.Ct. 746, 187 L.Ed.2d 624, 82 USLW 4043 [2014]).

Defendant NHI is a Japanese holding company that does not conduct or transact any business in New York. NHI is not registered to do business in New York, does not: (i) own or lease real property in New York; (ii) file income or property taxes; and (iii) have a registered agent for service of process in New York (NHI's Moving Papers Takayama Aff). More importantly, Plaintiff was employed by Defendant NSI, not NHI as highlighted by the Employment Letter (NHI's Moving Papers Ex. C). While the Stock Unit Award Agreement names Defendant NHI, the Agreement make plain that the entity that is awarding the CSUs is Defendant NSI (NHI's Moving Papers Exs. E, F). The Award Agreements plainly states that NHI has no contractual or other payment obligation to employees, specifically:

> "For each CSU that vests pursuant to Section 4 of this Agreement, the Employer [Defendant NSI] shall pay to the participant [Plaintiff] on the Payment Date the amount specified in Section 6 of the Plan less applicable witholdings...The obligation to make this payment shall be an unfunded, unsecured obligation of the Employer [NSI] only, and shall not be an obligation of the Company [NHI]" (NHI's Moving Papers Exs. G, H).

**Pursuant to the *Daimler* Test, Defendant NHI's affiliations with New York is not "so constant and pervasive as to render NHI essentially at home in New York" (Daimler, supra). The Amended Complaint lacks any allegations concerning NHI other than a conclusory allegation that it is a joint employer of Plaintiff. This court lacks jurisdiction over Defendant NHI.**

**Defendant NSI moves to dismiss the Amended Complaint and compel arbitration pursuant to the Employment Letter. "[I]t has long been this State's policy that, where parties enter into an agreement and, in one of its provisions, promise that any dispute arising out of or in connection with it shall be settled by arbitration, any controversy which arises between them and is within the compass of the provision must go to arbitration" (Gomez v Brill Sec., Inc., 95 AD3d 32, 943 NYS2d 400 [1st Dept. 2012] *citing* Matter of Exercycle Corp. [Maratta], 9 NY2d 329, 174 NE2d 463, 214 NYS2d 353 [1961]). Since an agreement to arbitrate is a contract, a clear expression to arbitrate shall "be enforced according to its terms" (Gomez, supra *citing* Vermont Teddy Bear Co. v 538 Madison Realty Co., 1 NY3d 470, 807 NE2d 876, 775 NYS2d 765 [2004];First Options of Chicago, Inc. v Kaplan, 514 US 938, 943, 115 S Ct 1920, 131 L Ed 2d 985 [1995]["arbitration is simply a matter of contract between the parties"]).**

**The Employment Letter states:**

> **Governing Law. This agreement shall be governed by the law of the State of New York without giving effect to conflict of law principles. You agree that any dispute or disagreement arising out of your employment or this compensation agreement, including discrimination claims, shall be submitted to arbitration before FINRA in the City and State of New York. You further agree that any decision rendered shall be contained in a reasoned award, which, to the extent permitted by law, shall be subject to judicial review for errors of law (NSI Moving Papers Ex. E).**

**The language of the Employment Letter agreed upon by Plaintiff and Defendant NSI is clear and unambiguous. Since New York's public policy favors the enforcement of arbitration agreements (Matter of Weinrott [Carp.], 32 NY2d 190, 344 NYS2d 848, 298 NE2d 42 [1973]) as it serves as a means of conserving the time and resources of the courts and the contracting parties (Nationwide Gen. Ins. Co. v Inv'rs Ins. Co., 37 NY2d 91, 371 NYS2d 463, 332 NE2d 333 [1975]), the court here is in agreement with Defendant NSI that Plaintiff's claims must be arbitrated. Plaintiff's causes of action for severance and deferred compensation arise directly out of his employment with Defendant NSI. The Complaint must be dismissed against Defendant NSI.**

**Plaintiff's cross-motion for an extension to properly serve Defendant NHI is denied as moot as the court lacks personal jurisdiction over NHI in this action.**

**ACCORDINGLY, it is ORDERED, that Defendant Nomura Holdings, Inc.'s motion to dismiss the Amended Complaint is granted, and it is further,**

**ORDERED, that the Complaint as against Defendant Nomura Holdings, Inc. is dismissed, and it is further,**

**ORDERED, that Defendant Nomura Securities International, Inc.'s motion to dismiss the Amended Complaint and compel arbitration is granted, and it is further,**

**ORDERED, that the case against Defendant Nomura Securities International, Inc. is dismissed without prejudice to Plaintiff submitting the claims asserted against Defendant Nomura Securities International, Inc. for resolution to arbitration, and it is further,**

**ORDERED, that the clerk shall enter judgment accordingly.**

**ENTER:**

**Dated: July 7, 2017** **MANUEL J. MENDEZ**
**J.S.C.**

MANUEL J. MENDEZ
J.S.C.

**Check one:** X **FINAL DISPOSITION** ☐ **NON-FINAL DISPOSITION**

**Check if appropriate:** ☐ **DO NOT POST** ☐ **REFERENCE**