SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ROBERT D. KALISH **PART** IAS MOTION 29EFM

Justice

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INDEX NO. 155379/2017

LAUREN MAY

MOTION DATE 6/04/2018

Plaintiff,

MOTION SEQ. NO. 002

- v -

ATHENAHEALTH, INC.,

Defendant.

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 25, 26, 27, 28, 29, 31, 32, 33, 34

were read on this motion to/for DISMISSAL.

Upon the foregoing documents, it is ORDERED that the instant motion to dismiss pursuant to CPLR 3211 (a) (1), (2), (4), (7) and (8) is granted for the reasons stated herein:

BACKGROUND

Plaintiff Lauren May brings the instant action alleging a single cause of action for a violation of the New Jersey Conscientious Employee Protection Act ("CEPA"), NJ Stat. Ann. 34:19-3. Specifically, Plaintiff alleges that Defendant Athenahealth, Inc. – her employer – violated said act because it retaliated against her by "effectively terminating" her employment after she raised concerns that her manager Ariel Fried was requesting that Plaintiff "misappropriate the technology, intellectual property and trade secrets of a company with whom [A]thenahealth had been working, and whom had provided [A]thenahealth access to their system, Decidedly, LLC." (Am Comp. ¶ 13.)

Defendant Athenahealth has filed its own complaint in the United States District Court for the District of Massachusetts. In that action, Defendant alleges, in sum and substance, that at the time that Plaintiff's employment terminated – on June 17, 2016 – Plaintiff illegally refused to return a laptop computer owned by Athenahealth and was in possession of other of Athenahealth's confidential and

proprietary information. According to Defendant, the federal court in that action issued a preliminary injunction requiring Plaintiff to turn the laptop over.

Defendant moves to dismiss the instant complaint on three grounds:

(1) Because Plaintiff's employment agreement requires that any dispute concerning her employment be "brought in a court of competent jurisdiction in the state in which the office to which [Plaintiff] reports is located" – which in this case was Massachusetts according to Defendant;
(2) On the grounds of forum non conveniens pursuant to CPLR 327;
(3) Because Plaintiff has failed to state a cause of action, under CPLR 3211 (a) (7), in that Plaintiff is unable to "identify explicitly a law, rule, regulation, or clearly defined mandate of public policy which she contends was violated by Athena." (Memo. in Supp. at 16.)

For the reasons stated herein, this Court finds that under the employment agreement, the instant action cannot be brought in New York. Because this Court dismisses the instant case on the first ground, this Court does not address Defendant's argument that Plaintiff fails to state a claim pursuant to CPLR 3211 (a) (7) or that the complaint should be dismissed pursuant to the doctrine of forum non conveniens.

DISCUSSION

I. *Forum Selection Clause*

Plaintiff's employment agreement contains a forum selection provision, which states in the relevant part as follows:

> "[Except under] Section 8, any dispute . . . concerning Employee's employment with or separation from Athena will be referred to mediation . . . . [before being] brought in a court of competent jurisdiction in the state in which the office to which Employee reports is located."

(NYSCEF Document No. 24 [Employment Agreement].)

II. *Arguments*

Defendant argues that, even though May worked remotely from her home in New Jersey – and then briefly from her home in Lake Placid, New York in June of

2016 – there is no dispute that Ms. May reported to Athena's Watertown, Massachusetts office at the time of her separation from employment and when the facts giving rise to her claim occurred." (Memo in Supp at 9.) Defendant argues that Plaintiff "admitted that she reported to the Athena's Watertown, Massachusetts" office when she emailed her manager Ariel Fried that she was moving to upstate New York and that she did not expect the move to "raise any concerns" based on her conversations with the Human Resources Department, because her new home would be roughly an equidistant commute to Boston as her old home was in New Jersey. (Memo in Supp. at 4; Ex. B [Coppola Aff. with Email].)

Defendant attaches an unnotarized affidavit from Ms. Fried who states, among other things, that "[d]uring the time that I was her manager, Ms. May reported to Athena's Watertown, Massachusetts office, where I was located along with the rest of her team and the majority of her Stakeholders" and that during such time "I was unaware of Ms. May receiving any assignments from anyone in Athena's Princeton, New Jersey office." ([Coppola Aff. with Email] ¶ 12.)

In addition, Defendant argues that in the Massachusetts federal action, Plaintiff – there a defendant – moved to dismiss that action on the ground, among others, that that New Jersey was the appropriate forum for the dispute with Athena. Defendant – there the plaintiff – argues that this argument was rejected by the federal court.

To be clear, the Court specifically gave the following reasoning in rejecting the motion to dismiss by the instant Plaintiff (there the defendant):

> "Plaintiff [Athenahealth] has alleged that defendant [May]'s manager and team members worked in Massachusetts and that her employment ended in large part because of her inability to work in-person with those colleagues. When defendant notified her manager of her move from New Jersey to New York, she noted that her travel time to Boston would be unchanged (though, presumably, the travel time to Princeton, New Jersey would have increased).
>
> Moreover, defendant has appeared before (and filed pleadings in) this Court on multiple occasions and yet has failed to challenge venue. Although a party's appearance in a particular court does not constitute a waiver of rights under a forum selection clause, defendant's consistent conduct during the course of this litigation is an acknowledgement that she understands that Massachusetts is the appropriate venue for this case.

> Construing the facts in a light most favorable to the plaintiff, as the Court must do, a reasonable inference may be drawn that defendant reported to the office in Massachusetts and, therefore, a district court sitting in Massachusetts is the appropriate forum for this dispute."

(*Athenahealth, Inc. v May*, 272 F Supp 3d 281, 284 [D Mass 2017].) Based on this ruling, Defendant argues, pursuant to the doctrine of res judicata, that this Court should dismiss the complaint in deference to federal court's finding that "Massachusetts is the appropriate venue for this case." (Id.)

In opposition, Plaintiff argues that there is considerable evidence that Plaintiff reported to Defendant's office in New Jersey. For example, Plaintiff points out that in the federal action, Defendant – there the plaintiff – stated in its complaint that Plaintiff – there the defendant – "initially worked for Athena from its Watertown, Massachusetts office," she "later transferred to the Princeton, New Jersey office." (Affirm in Supp., Ex. E [D. Mass. Complaint] ¶ 30.) Plaintiff states, in her own sworn statement, that although she began working from home, she "never transferred back to the Watertown, Massachusetts office." Plaintiff states that she also paid her taxes in New Jersey, that she "remained domiciled" in New Jersey notwithstanding that she "began working from a residence in New York", and that upon her termination from Defendant "I received unemployment benefits from New Jersey." (Affirm. in Opp., Ex. 1 [Plaintiff Decl. with Exhibits] ¶ 5.) Plaintiff also attaches a document entitled "INSTRUCTIONS FOR CLAIMING UNEMPLOYMENT BENEFITS" which under "Work location" lists: "502 Carnegie Center Suite 301, Princeton, NJ 08540." (Id.)

Plaintiff states that while she has "always acknowledged that she has a general forum selection clause in her employment agreement, it does not address any claims under the New Jersey Conscientious Employee Protection Act." (Memo in Opp. at 5, citing *Kanafani v. Lucent Techs., Inc.*, No. 07-11 (JLL), 2009 U.S. Dist. LEXIS 85514, at *22 (D.N.J. Sep. 18, 2017).)

Plaintiff further argues that in the Massachusetts federal action, the court only determined that under the forum clause, "[c]onstruing the facts in a light most favorable to the plaintiff, as the Court must do, a reasonable inference may be drawn that defendant reported to the office in Massachusetts and, therefore, a district court sitting in Massachusetts is the appropriate forum for this dispute." (Memo in Opp. at 5, quoting *Athenahealth, Inc. v May*, 272 F Supp 3d 281, 284 [D

Mass 2017].) As such, Plaintiff argues that the federal court's decision does not have res judicata effect.

In reply, Defendant, in sum and substance, reiterates the same points it made on its opening papers.

III. *Analysis*

As a preliminary matter, this Court notes that when a defendant moves to dismiss on the grounds that a forum selection clause dictates that the action be brought in another forum, that defendant moves pursuant to CPLR 3211 (a) (1) because "[a]s a term of the contract between the parties, however, a contractual forum selection clause is documentary evidence that may provide a proper basis for dismissal pursuant to CPLR 3211(a)(1)." (*Lischinskaya v Carnival Corp.*, 56 AD3d 116, 123 [2d Dept 2008].)[1]

> "Dismissal of a complaint pursuant to CPLR 3211(a)(1) is only appropriate where the documentary evidence presented conclusively establishes a defense to the plaintiff's claims as a matter of law. The documents submitted must be explicit and unambiguous. In considering the documents offered by the movant to negate the claims in the complaint, a court must adhere to the concept that the allegations in the complaint are presumed to be true, and that the pleading is entitled to all reasonable inferences. However, while the pleading is to be liberally construed, the court is not required to accept as true factual allegations that are plainly contradicted by documentary evidence."

(*Dixon v 105 W. 75th St. LLC*, 148 AD3d 623, 626–27 [1st Dept 2017] [internal citations omitted].)

It is generally "recognized that parties to a contract may freely select a forum which will resolve any disputes over the interpretation or performance of the contract. Such clauses are prima facie valid and enforceable unless shown by the resisting party to be unreasonable." (*Brooke Group Ltd. v JCH Syndicate 488*, 87 NY2d 530, 534 [1996].) "Forum selection clauses are enforced because they

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[1] "In circumstances where there is a valid forum selection clause requiring that the dispute be litigated in a forum other than one in this state, dismissal is not discretionary, but is the necessary consequence of enforcing the contract between the parties." (*Lischinskaya v Carnival Corp.*, 56 AD3d 116, 123 [2d Dept 2008].)

provide certainty and predictability in the resolution of disputes." (*Boss v Am. Express Fin. Advisors, Inc.*, 6 NY3d 242, 247 [2006].)

Here, the parties agree that the following forum selection clause is enforceable and generally controls where an action may be brought regarding the employment relationship:

> [A]ny dispute . . . concerning Employee's employment with or separation from Athena . . . . must be brought in a court of competent jurisdiction in the state in which the office to which Employee reports is located."

(NYSCEF Document No. 24 [Employment Agreement].)

Plaintiff however argues that the above clause does not does not encompass the CEPA claims in this action, citing a federal case from the District of New Jersey called *Kanafani v Lucent Tech. Inc.*, (CIV. A. 07-11 (JLL), 2009 WL 3055363, [DNJ Sept. 18, 2009].) In *Kanafani* the defendant sought to dismiss the plaintiff's CEPA claims, along with the complaint in its entirety, because the plaintiff signed an employment contract that stated that "[a]ll disputes between the parties arising out of the employment relations or connected therewith, will be settled by the UAE courts of law and according to the UAE law." The United States District Court for the District of New Jersey explained that "under New Jersey law, a party's waiver of statutory rights must be clearly and unmistakably established, and contractual language alleged to constitute a waiver will not be read expansively." (Id. at *8.) Looking at the contract – which the *Kanafani* court admitted was very broad – the court found that "there is no indication in the contract that the provision includes statutory discrimination or retaliation claims" and thus it refused to dismiss the Plaintiff's CEPA claims.

The instant case is different for two reasons. First, there is no colorable argument that by agreeing to the forum selection provision, Plaintiff waived her right to bring CEPA claims. Rather, the provision only limits and clarifies the forum that the CEPA claims can be brought in. In addition, that the agreement specifically refers to disputes "concerning Employee's employment with ***or separation from Athena***" specifically indicates an intent to include claims – including statutory claims – that arise out of the termination of Plaintiff's employment. As such, the forum selection clause must be read to include Plaintiff's CEPA claims because the provision specifically enumerates causes of action arising from Plaintiff's separation from Defendant.

The parties also disagree as to the location of the office to which Plaintiff reported: Defendant contends that Plaintiff reported to the office in Watertown, Massachusetts; and, Plaintiff contends that she reported to the office located in Princeton, New Jersey.

The federal court sitting in Massachusetts however reviewed this issue and found as follows:

> "Construing the facts in a light most favorable to the plaintiff [Athenahealth], as the Court must do, a reasonable inference may be drawn that defendant reported to the office in Massachusetts and, therefore, a district court sitting in Massachusetts is the appropriate forum for this dispute."

(*Athenahealth, Inc. v May*, 272 F Supp 3d 281, 284 [D Mass 2017]; *see also Westchester County Correction Officers Benev. Ass'n, Inc. v County of Westchester*, 65 AD3d 1226, 1227 [2d Dept 2009] [finding that the defendants were collaterally estopped from relitigating issue of the plaintiff's standing because a court had denied a motion to dismiss on the issue in a "largely identical" prior action].) Clearly, the federal court applied a different standard in determining whether Massachusetts was an appropriate venue under the forum selection clause than this court employs: that court construed the facts in the light most favorable to the plaintiff there – here Defendant – that there was a reasonable inference that the chosen venue was appropriate; this Court must determine whether the forum selection clause at issue conclusively and unambiguously establishes that action must be brought in another forum.

Even though the federal court's determination is not controlling on the Court here, this Court finds that it must still dismiss the case pursuant to the forum selection clause. The Court finds that, although it is arguable whether Plaintiff reported to an office in Massachusetts or New Jersey, one thing is certain: neither side claims that Plaintiff reported to an office located in New York. As such, although the forum selection clause does not set forth the specific state that the instant dispute must be brought in – either New Jersey or Massachusetts – it conclusively and unambiguously infers that the instant dispute is not to be adjudicated in New York. Therefore, this Court must dismiss the instant action, pursuant to the parties' contractual requirement—that this case be litigated before "a court of competent jurisdiction in the state in which the office to which Employee reports is located"—which clearly was not New York. Whether the

appropriate jurisdiction for this action is New Jersey or Massachusetts, this Court need not decide.

CONCLUSION

Accordingly, it is hereby

ORDERED that the instant motion by Defendant Athenahealth, Inc. to dismiss the complaint in its entirety, pursuant to CPLR 3211 (a) (1), is granted, and the complaint is dismissed without prejudice, and the clerk is directed to enter judgment accordingly.

The foregoing constitutes the decision and order of the Court.

7/27/2018
DATE

HON. ROBERT D. KALISH
J.S.C.

CHECK ONE:	[X]	CASE DISPOSED		[ ]	NON-FINAL DISPOSITION	
	[X]	GRANTED	[ ] DENIED	[ ]	GRANTED IN PART	[ ] OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER	
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ] REFERENCE