E & S Med. Staffing Servs., Inc. v Kaaterskill Operating, LLC
2018 NY Slip Op 33884(U)
October 15, 2018
Supreme Court, Orange County
Docket Number: EF008084-2017
Judge: Catherine M. Bartlett
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SUPREME COURT-STATE OF NEW YORK
IAS PART-ORANGE COUNTY

Present: HON. CATHERINE M. BARTLETT, A.J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

----------x

E & S MEDICAL STAFFING SERVICES, INC.,

Plaintiff,

-against-

KAATERSKILL OPERATING, LLC, d/b/a GREENE MEADOWS NURSING and REHABILITATION CENTER,

Defendants.

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To commence the statutory time period for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

Index No. EF008084-2017
Motion Date: August 8, 2018

The following papers numbered 1 to 6 were read on Defendants' motion to dismiss the Complaint pursuant to CPLR §§ 3211 and 3212:

Notice of Motion - Affirmation / Exhibits - Affidavit / Exhibits 1-3

Affirmation in Opposition / Exhibits - Affidavit / Exhibits 4-5

Reply Affirmation 6

Upon the foregoing papers it is ORDERED that the motion is disposed of as follows:

This is an action for breach of contract. Plaintiff E & S Medical Staffing Services, Inc. ("E&S") is a medical employment agency which provides licensed nurses on a temporary basis to nursing facilities. Defendant Kaaterskill Operating, LLC d/b/a Greene Meadows Nursing and Rehabilitation Center ("Greene Meadows") is a nursing home. On or about June 13, 2016, E&S and Greene Meadows entered into an Agreement whereby E&S agreed to provide licensed nurses

to Greene Meadows on a temporary basis to meet its staffing needs for nursing personnel. The Agreement provides in pertinent part:

> Facility acknowledges and understands that all Personnel provided by Agency pursuant to this Agreement are employees of Agency exclusively.
>
> Facility shall not in any way recruit Personnel employed or provided by another Agency during the term of this Agreement. Facility understands that we are a Temp Agency and Personnel are assigned to the Facility to render temporary services and are not to become employees of the Facility. The Facility may not hire ESMSS unless by prior written Agreement with Agency setting forth the manner in which Agency is to be compensated for such expenses. If Facility violates this provision this "liquidated damage" said compensation to Agency shall be fixed at a minimum of personnel's bill rate, times eight (7.25) hours, times (120) days to Agency.
>
> Notwithstanding above provisions, Facility shall not employ any Agency Personnel for any reason within 365 days of last date Personnel were employed by ESMSS, or accepts any ESMSS personnel through another Agency in your Facility. Once ESMSS Faxes / emails over employee's profiles Facility shall not allow any other agency to present that profile for (365) days. If the facility violates this provision this "liquidated damage" said compensation to ESMSS shall be fixed at a minimum of personnel's bill rate, times eight (7.25) hours, times (120) days to Agency. This will then be paid upon receipt of invoice. [sic]

One Emma Lavoie, a licensed practical nurse, was placed by E&S at Greene Meadows beginning in June of 2016, and up to June 4, 2017. Thereafter, on June 10, 2017, Ms. Lavoie was placed at Greene Meadows by the Norman Agency, E&S's direct competitor. E&S charged that Greene Meadows' employment of Ms. Lavoie through the Norman Agency constituted a violation of the underscored provision of the Agreement, and invoiced Greene Meadows for liquidated damages in the amount of $35,670.00 ($41 per hour contract billing rate x 7.25 hours x 120 days).

Upon Greene Meadows' refusal to pay, E&S commenced this action for breach of contract. Greene Meadows moves pursuant to CPLR §3211(a)(1, 7) and §3212 to dismiss the

Complaint upon the purported grounds that the Agreement constitutes an overly broad and unenforceable non-compete agreement which unduly limits Ms. Lavoie's ability to work, and that the liquidated damages provision is unconscionable.

E&S responds that (1) the public policy limitations on enforcement of restrictive covenants in employment agreements are irrelevant because this case does not involve an employment agreement, but a commercial contract between an employment agency and a nursing home; (2) Greene Meadows indisputably breached the Agreement; and (3) the liquidated damages provision is not unconscionable, and is enforceable per *Truck Rent-A-Center, Inc. v. Puritan Farms 2nd, Inc.*, 41 NY2d 420 (1977) because actual damages are difficult if not impossible to calculate. Although E&S did not move for summary judgment, it nevertheless requests judgment in the amount demanded in the Complaint.

Legal Analysis

A. The Governing Legal Standards

"On a motion to dismiss the complaint pursuant to CPLR 3211(a)(7) for failure to state a cause of action, the court must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory." *Agai v. Liberty Mutual Agency Corporation,* 118 AD3d 830, 831-832 (2d Dept. 2014) (citing *Leon v. Martinez,* 84 NY2d 83, 87). *See, ABN AMRO Bank, N.V. v. MBIA INC.,* 17 NY3d 208 (2011); *83-17 Broadway Corp. v. Debcon Financial Services, Inc.,* 39 AD3d 583, 585 (2d Dept. 2007). Where a defendant submits evidentiary material in support of a Section 3211(a)(7) motion to dismiss, "the criterion then becomes 'whether the proponent of the pleading has a cause of

action, not whether he has stated one' (*Guggenheimer v. Ginzburg,* 43 NY2d [268,] 275...). Yet, affidavits submitted by a defendant 'will almost never warrant dismissal under CPLR 3211 unless they 'establish conclusively that [the plaintiff] has no cause of action' " (*Lawrence v. Graubard Miller,* 11 NY3d 588, 595..., quoting *Rovello v. Orofino Realty Co.,* 40 NY2d [633,] 636....). Indeed, a motion to dismiss pursuant to CPLR 3211(a)(7) must be denied 'unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it' (*Guggenheimer v. Ginzburg,* 43 NY2d at 275....)." *Sokol v. Leader,* 74 AD3d 1180, 1181-82 (2d Dept. 2010).

Similarly, a motion to dismiss pursuant to CPLR §3211(a)(1) based upon documentary evidence may be granted only where the evidence "utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law..." *Goshen v. Mutual Life Insurance Company of New York*, 98 NY2d 314, 326 (2002). *See, Gad v. Sherman,* 160 AD3d 622 (2d Dept. 2018); *Dodge v. King,* 19 AD3d 359, 360 (2d Dept. 2005) (under CPLR 3211[a][1] "the documentary evidence that forms the basis of the defense must be such that it resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim").

B. Defendant Has Not Shown That The Agreement Is Unenforceable

1. Public Policy Considerations With Respect To Restrictive Covenants

In *Career Blazers of White Plains, Inc. v. Northern Homefunding Corporation,* 194 Misc.2d 518 (City Ct. White Plains), the plaintiff provided the defendant with a temporary receptionist. Defendant thereafter hired the receptionist outside of his temporary assignment and without the plaintiff's permission. The agreement between the parties was not unlike the June 13, 2016 Agreement at issue here. It provided:

> Client agrees not to directly or indirectly offer to hire, hire or engage as an independent contractor any temporary employee assigned to client by Career Blazers for a period of 90 days after completion of the temporary employee's assignment, or permit or cause any such temporary employee to be placed on the payroll of any other firm for a like period, without the express written permission of Career Blazers. In the event client violates this paragraph, client promises to promptly pay to Career Blazers liquidated damages and not as a penalty, the sum of three thousand dollars ($3,000.00) or a charge which shall be a percent of employee's annualized salary (hourly wage times 37.5 times 52); such percent to be computed by dividing such salary by $1,000, whichever sum is greater...."

Id., 194 Misc.2d at 519-520. The *Career Blazers* Court held this to be an enforceable fee arrangement between an employment agency and its client, the temporary employee's employer. *Id.*, at 520-521.

The Agreement between E&S and Greene Meadows is likewise enforceable, in principle, as a fee arrangement between an employment agency and an employer. As Plaintiff observes, the employee is not a party to this litigation, this case does not involve a restrictive covenant in an employment agreement, and the public policy considerations bearing on enforcement of restrictive covenants in employment agreements are simply inapplicable to fee arrangements between employment agencies like E&S and employers like Greene Meadows.

2. Alleged Unconscionability Of The Liquidated Damages Provision

Greene Meadows alleges in conclusory terms that the Agreement's "liquidated damages" provision is "unconscionable", but does not even attempt to analyze that provision under the legal standard governing the enforceability of contractual liquidated damages clauses.

Under New York law,

> A contractual provision fixing damages in the event of breach will be sustained if the amount of liquidated damages bears a reasonable proportion to the probable loss and the amount of actual loss is incapable or difficult of precise estimation [cit.om.]. If, however, the amount fixed is plainly or grossly disproportionate to the provable loss, the provision calls for a penalty and will not be enforced.

Truck Rent-A-Center, Inc. v. Puritan Farms 2nd, Inc., supra, 41 NY2d 420, 425 (1977). Whether the provision in question "represents an enforceable liquidation of damages or an unenforceable penalty is a question of law, giving due consideration to the nature of the contract and the circumstances." *JMD Holding Corp. v. Congress Financial Corp.,* 4 NY3d 373, 379 (2005). "[T]he agreement should be interpreted as of the date of its making and not as of the date of its breach." *Truck Rent-A-Center, Inc., supra,* 41 NY2d at 425.

"The burden is on the party seeking to avoid liquidated damages...to show that the stated liquidated damages are, in fact, a penalty [cit.om.]. Further, 'where the court has sustained a liquidated damages clause the measure of damages for a breach will be the sum in the clause, no more, no less. If the clause is rejected as being a penalty, the recovery is limited to actual damages proven' [cit.om.]." *JMD Holding Corp. v. Congress Financial Corp., supra,* 4 NY3d at 380.

Interestingly, the Agreement fixes liquidated damages in precisely the same amount regardless of whether Greene Meadows violated the Agreement by hiringan E&S nurse (1) as its own permanent employee, or (2) on a temporary basis but through a different employment agency. It strikes the Court that the "probable loss" to E&S in those two scenarios may well differ, and hence the specified liquidated damages could conceivably be reasonably proportionate to the probable loss in one case, and grossly disproportionate in the other. However, determination of that issue, or any other issue respecting the enforceability of the liquidated damages provision, requires "due consideration to the nature of the contract and the circumstances" (*JMD Holding Corp., supra,* 4 NY3d at 379), and Greene Meadows has neither proven the relevant circumstances nor analyzed them under governing law.

Greene Meadows having proffered no analysis of the Agreement's liquidated damages provision under the applicable legal standard, it has failed to carry its burden of establishing that the provision is in fact an unenforceable penalty.

C. Plaintiff's Request For Summary Judgment

Since the factual record is insufficiently developed on the papers submitted, the Court declines E&S's request that it search the record and award Plaintiff summary judgment for the amount demanded in the Complaint, i.e., liquidated damages in the amount of $35,670.00. Among other concerns, the Court notes that, although not raised by the parties, there is an issue whether Article 11 of the General Business Law (governing the business of employment agencies) affects the enforceability of the Agreement as written.

The fees chargeable by employment agencies are regulated by Article 11 of the General Business Law ("GBL"). As one Court has observed, "[a]n examination of the legislative history of the law regulating employment placement of nurses shows that the State of New York has long deemed it advisable and necessary to control the fees chargeable by nurses' employment agencies." *Gail Turner Nurses Agency, Inc. v. State of New York,* 17 Misc.2d 273, 274 (Sup. Ct. N.Y. Co. 1959).

For purposes of Article 11, an "employment agency" is defined as "any person...who, for a fee, procures or attempts to procure (1) employment or engagements for persons seeking employment or engagements, or (2) employees for employers seeking the services of employees." GBL §171(2)(a). The term "fee" is broadly defined to mean "anything of value, including any money or other valuable consideration charged, collected, received, paid or promised for any service, or act rendered or to be rendered by an employment agency..." GBL §171(3).

GBL §185 establishes maximum fees chargeable by an employment agency in connection with the placement of employees in nursing engagements. The relevant provisions of GBL §185 are as follows:

> 1. ...The maximum fees provided for herein for all types of placements or employment may be charged to the job applicant and a similar fee may be charged to the employer....The fees charged to employers by any licensed person conducting an employment agency for rendering services in connection with, or for providing employment in classes "A", "A-1" and "B", as hereinafter defined is subdivision 4 of this section where the applicant is not charged a fee shall be determined by agreement between the employer and the employment agency....
>
> 2. Size of fee; payment schedule. The gross fee charged to the job applicant and the gross fee charged to the employer each shall not exceed the amounts enumerated in the schedules set forth in this section, for any single employment or engagement, except as hereinabove provided....
>
> ....
>
> 4. Types of employment. For the purpose of placing a ceiling over the fees charged by persons conducting employment agencies, types of employment shall be classified as follows:
>
> ....
>
> Class "D" – nursing engagements as defined in Article 139 of the Education Law.[1]
>
> ....
>
> 9. Fee ceiling: For a placement in Class "D" employment the gross fee shall not exceed, for a single engagement, the following:
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> ....
>
> (2) for any other nursing duty, the amount of the first week's salary or wages unless the first year's computed salary or wages to be derived for at least one year's employment is $2,500 or more, in which event the gross fee shall not exceed, in percentage of such salary or wages, the following:
>
> where such first year's salary or wages is...$5,000 or more....5%.

The question arises whether the fee ceiling prescribed by GBL §185 for an employment agency's placement of a nurse in a Class "D" nursing engagement limits "liquidated damages" of

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[1]Article 139 of the Education Law governs *inter alia* the practice of licensed practical nursing. *See,* Education Law §6903.

the type contained in the Agreement between E&S and Greene Meadows. However, as this issue has not been presented or briefed by the parties, it is not ripe for decision.

In view of the foregoing, it is

ORDERED, that Defendant's motion to dismiss the Complaint is denied.

The foregoing constitutes the decision and order of this Court.

Dated: October 15, 2018 ENTER
Goshen, New York

HON. CATHERINE M. BARTLETT, A.J.S.C.

HON. C. M. BARTLETT
JUDGE NY STATE COURT OF CLAIMS
ACTING SUPREME COURT JUSTICE