

<b>SJL Mgt. Inc. v Jacobs</b>
2019 NY Slip Op 31301(U)
May 6, 2019
Supreme Court, New York County
Docket Number: 656624/2017
Judge: Margaret A. Chan
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. MARGARET A. CHAN PART IAS MOTION 33EFM**

*Justice*

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**INDEX NO. 656624/2017**

SJL MANAGEMENT INC. D/B/A THE CALENDAR GROUP,

**MOTION DATE 05/15/2018**

Plaintiff,

**MOTION SEQ. NO. 002**

- v -

ELI JACOBS, ESSEX MANAGEMENT COMPANY

**DECISION AND ORDER**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 28, 29, 30, 31, 32, 33, 34, 35, 41, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 134, 137

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER).

In this action for breach of contract, plaintiff SJL Management, Inc., d/b/a The Calendar Group, moves pursuant to CPLR 3213 for summary judgment in lieu of complaint. Defendants Essex Management Company and Eli Jacobs cross-move pursuant to CPLR 3211(a)(7) to dismiss Plaintiff's motion and to amend the caption to remove Eli Jacobs as a defendant.

**Factual Background**

Plaintiff, a corporate staffing agency, entered into an agreement on August 10, 2017, with Essex Management Company (Essex), a management company, to source candidates for an Executive Assistant position for Essex (NYSCEF # 30 – the Agreement). The Agreement provides that Plaintiff shall “source candidates who meet the requirements verbally communicated to them by [Essex]” and that Plaintiff is to “conduct extensive interviews with possible candidates” and perform background checks (*id.*). The parties agreed that where Plaintiff “introduces the appropriate candidate and such candidate is hired by [Essex] for said position,” Essex shall pay Plaintiff a commission in the amount of twenty-five percent of the candidate’s first year salary (*id.*).

On August 14, 2017, Plaintiff recommended Kathrine Glass for the position. Plaintiff conducted a telephone and Skype interviews with Glass prior to recommending Glass to Essex. Plaintiff provided Essex with the result of Glass’ background checks.

In late August, Kimberly Byrne, Vice President of Essex, interviewed Glass. On September 1, 2017, Byrne conducted a “walking interview” with Glass, and requested that Glass return for a second walking interview. At the second walking interview, Glass met with Eli Jacobs, the CEO of Essex, who asked Glass questions about her previous employment. According to Glass, she was hired for the Executive Assistant position on September 18, 2017.

On the same day that Glass was hired, Plaintiff sent Essex an invoice for the commission amount of \$30,000, representing twenty-five percent of Glass’ purported first year salary of \$120,000. On October 3, 2017, the day after the payment was due under the Agreement, Steve Laitmon, Plaintiff’s CEO, e-mailed Byrne to inquire why the invoice remained unpaid (NYSCEF # 31). Byrne immediately responded letting Laitmon know that “the invoice will be paid. I do not have time right now.” (*Id.*). In another e-mail later that day, Byrne again indicated that payment of the invoice was forthcoming (*id.*). On November 15, 2017, Glass resigned from Essex.

### Standard

It is well settled that when considering a motion to dismiss under CPLR 3211(a)(7), the court must evaluate “whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail” (*African Diaspora Maritime Corp. v Golden Gate Yacht Club*, 109 AD3d 204 [1st Dept 2013]). Generally, the court must accept the facts in plaintiff’s complaint as being true, and “accord plaintiffs the benefit of every possible favorable inference” (*Goldman v Metropolitan Life Ins. Co.*, 5 NY3d 561, 570-571 [2005] [internal quotations and citations omitted]). Once the court accepts the facts of the complaint as true, the court must determine whether, “plaintiff can succeed upon any reasonable view of the facts stated” (*Campaign for Fiscal Equity, Inc. v State*, 86 NY2d 307, 318 [1995]). However, “allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not” accepted as true or accorded every favorable inference (*David v Hack*, 97 AD3d 437 [1st Dept 2012]).

“Summary judgment must be granted if the proponent makes ‘a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact,’ and the opponent fails to rebut that showing” (*Brandy B. v Eden Cent. School Dist.*, 15 NY3d 297, 302 [2010], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). However, if the moving party fails to make a *prima facie* showing, the court must deny the motion, “regardless of the sufficiency of the opposing papers” (*Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008], quoting *Alvarez*, 68 NY2d at 324).

### *Breach of Contract*

Defendants contend that they never hired Glass. Hence, they argue that Plaintiff fails to state a cause of action for breach of contract and that Defendants do not owe Plaintiff a brokerage commission.

To set forth a breach of contract claim, a plaintiff must allege the existence of a contract, performance by the plaintiff, failure to perform by the defendant, and damages (*Noise in Attic Productions, Inc. v London Records*, 10 AD3d 303, 304 [1st Dept 2004]). Plaintiff alleges that it entered into an agreement with Essex, wherein Plaintiff agreed to conduct an employee search to fill an executive assistant position at Essex, that Plaintiff performed a search as required under the agreement, that Plaintiff produced a candidate, that Defendants hired the candidate, that Plaintiff invoiced Defendants for the fee, which Defendants acknowledged was due, and that Defendants failed to pay Plaintiff the commission as set forth under the Agreement (NYSCEF # 129, ¶¶ 9-18). As such, Plaintiff's allegations state a claim for breach of contract against defendant Essex. Plaintiff also demonstrates its entitlement to a commission fee under the Agreement by submitting evidence that it introduced Glass to Essex and that Essex hired Glass.

Defendants' contention that they never hired Glass is refuted by the ample evidence to the contrary. Glass' affidavit shows that she was formally hired on September 18, 2019 (NYSCEF # 34, ¶12). Glass avers that she was assigned several tasks as part of her employment as an Executive Assistant and that she was provided a company e-mail with a signature block indicating "In the office of Eli Jacobs [ ] Essex Management" (NYSCEF # 115 at 12). Moreover, there were several text messages between Byrne and Glass, wherein Byrne assigned work to, and discussed work-related tasks with, Glass (NYSCEF ## 104-106, 110, 111). Glass even sent Byrne a message declaring her resignation from Essex (NYSCEF # 112).

Further, Byrne had indicated that Essex was going to pay Plaintiff's invoice. The only reason for Essex to pay the invoice is if Essex hired the candidate. Had Glass not been hired pursuant to an annual salary, Essex would have no reason to pay the commission. The confirmation that Essex's payment was forthcoming is *prima facie* evidence of the amount of the commission fee, since the invoice indicated that the fee was twenty-five percent of Glass' salary of \$120,000.

Defendants also argue that Glass was not formally hired since there was no written employment agreement. There is neither mention of a written employment agreement requirement contained in the Agreement, nor is there a requirement that Essex engage the candidate in a certain type of employment. And since Glass' employment was at-will, a written agreement was not required under the statute of frauds. There is no allegation that Essex agreed to employ Glass for a

fixed duration of time. The relevant requirement is that Essex hire the candidate, which it did.

Defendants fail to address in any meaningful way Byrne's e-mail confirming Defendants' commitment to pay Plaintiff's invoice. Detrimental to Defendants' argument are Byrne's admissions that Essex hired the candidate. In both her affidavits in support of Defendants' opposition to Plaintiff's motion and in support of Defendants' order to show cause (mot. seq. 003), Byrne avers that "Essex hired the candidate after a brief training period" (NYSCEF ## 15 and 47, ¶¶ 21-23). Again, in her affidavit in support of Defendants' cross-motion, Byrne, while detailing her dissatisfaction with Glass' alleged inability to work on nights and weekends', admits that Glass was unable to help her perform a task, "one among many for which [Glass] was hired to perform" (NYSCEF # 94 at 4). Defendants do not address Byrne's clear statements that Essex had hired Glass. A speculation proffered by Defendants' counsel that an issue of fact exists as to whether Glass was hired on a freelance basis, does not improve Defendants' argument.

Defendants' arguments that it is not required to pay the commission because Plaintiff failed to perform under the Agreement is also without merit. Defendants conducted three interviews with Glass, including two "walking interviews," and thus had several opportunities to assess whether Glass was a good fit for the position prior to hiring her. Even after discovering that Plaintiff failed to conduct an in-person interview or provide references, Defendants took no action on Glass' employment. In fact, Defendants continued to assign work to Glass until she resigned on her own in mid-November.

Finally, Defendants request that the court consider its cross-motion as a motion for summary dismissal (NYSCEF #137, ¶ 17). Defendants did not raise dismissal pursuant to CPLR 3212 until its reply. As such, the court declines to convert the cross-motion to dismiss into a motion for summary judgment (*see* CPLR 3212 [c]). Even if Defendants' cross-motion were converted to a motion for summary judgment, it would be denied in light of the above discussion. In any event, Defendants move in motion sequence 3 for dismissal of the action, among other requests. To be clear, Defendants' request for a dismissal of the action – whether in a motion or a cross-motion – is denied. And Plaintiff's motion for summary judgment pursuant to CPLR 3213 against defendant Essex is granted.

*Co-defendant Eli Jacobs*

As to co-defendant Eli Jacobs, the CEO of Essex, Defendants' motion to dismiss the action as against him is granted.

Plaintiff alleges that since Byrne executed the Agreement on behalf of Jacobs personally, Jacobs is individually liable (Complaint, ¶11).<sup>1</sup> Plaintiff's bare conclusion that Jacobs was a party to the Agreement is refuted by the Agreement itself, which indicates that the contract is between Plaintiff and Essex only. The signature section also indicates that Byrne signed on behalf of "Essex Management" and that Essex is the party agreeing to be bound by the Agreement. The fact that Byrne signed as Essex's "VP + on behalf of Eli Jacobs/CEO" does not change this determination. Accordingly, the Jacobs is dismissed as a defendant in this action. The branch of defendants' cross-motion to remove Jacobs from the caption is granted, without opposition.

*Attorney's Fees*

The Agreement provides that "[u]pon any dispute or breach arising out of this Agreement, [Plaintiff] shall be entitled to recover any and all attorney's fees and costs incurred to defend, enforce, or collect under such agreement." Since this action seeks to enforce the Agreement and collect the commission fee, Plaintiff is entitled to attorney's fees for the prosecution of this action. The issue of the amount of attorney's fees Plaintiff is entitled to is referred to a Special Referee to hear and determine.

Conclusion

Accordingly, it is hereby

ORDERED that the motion of plaintiff SJL Management, Inc., d/b/a The Calendar Group, for summary judgment in lieu of Complaint pursuant to CPLR 3213 is granted as to defendant Essex Management Company only; it is further

ORDERED that the cross-motion of defendants Essex Management Company and Eli Jacobs, pursuant to CPLR 3211(a)(7) is granted to the extent that the action is dismissed as against defendant Eli Jacobs; it is further

ORDERED that the caption is amended to read as follows:

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SJL MANAGEMENT INC. D/B/A THE CALENDAR  
GROUP,

Index no. 656624/2017

Plaintiff,

- v -

<sup>1</sup> The court notes that in light of Essex's submission of the Delaware Division of Corporations printout indicating that Essex is registered as a corporation in that state, Plaintiff appears to back away from its allegation that Essex is an unregistered company (NYSCEF # 100).

ESSEX MANAGEMENT COMPANY,

Defendant.

x

it is further

ORDERED that a judgment be entered in favor of plaintiff SJL Management, Inc., d/b/a The Calendar Group and against defendant Essex Management Company in the amount of \$30,000, plus attorney's fees and costs to be determined by a Special Referee; it is further

ORDERED that the issue of the appropriate attorney's fees and costs is referred to a Special Referee to hear and determine; it is further

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119M, 646-386-3028 or spref@nycourts.gov) for placement at the earliest possible date upon which the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on the website of this court at www.nycourts.gov/suptctmanh at the "References" link under "Courthouse Procedures"), shall assign this matter to an available JHO/Special Referee to hear and report as specified above; and it is further

ORDERED that the parties shall immediately consult one another and counsel for plaintiffs shall, within 15 days from the date of this Order, submit to the Special Referee Clerk by fax (212-401-9186) or email, an Information Sheet (which can be accessed at the "References" link on the court's website) containing all the information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall advise counsel for the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referees Part.

This constitutes the Decision and Order of the court.

5/06/2019

DATE



MARGARET A. CHAN, J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
	<input type="checkbox"/> GRANTED		<input checked="" type="checkbox"/> GRANTED IN PART	
APPLICATION:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input checked="" type="checkbox"/> REFERENCE