Zhang v Paris Baguette Family, Inc.
2020 NY Slip Op 31798(U)
June 8, 2020
Supreme Court, Kings County
Docket Number: 507099/2020
Judge: Dawn M. Jimenez-Salta
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At an IAS Term, Part 88 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 8th day of June, 2020.

P R E S E N T:

HON. DAWN JIMENEZ-SALTA,
Justice.

- -X

FANG ZHANG,

Plaintiff,

Index No. 507099/2020
Mot. Seq. #1, 2 & 3

- against -

PARIS BAGUETTE FAMILY, INC.,

Defendant.

- -X

Recitation, as required by CPLR 2219(a), of the papers considered in the review of:

1) Plaintiff Fang Zhang's (Plaintiff) motion by order to show cause seeking a preliminary injunction, dated April 8, 2020;
2) Defendant Paris Baguette Family, Inc.'s (Defendant) motion by order to show cause seeking to vacate Plaintiff's order to show cause, staying or dismissing the complaint pursuant to CPLR 7503 and directing the parties to proceed with alternative dispute resolution, and attorneys' fees with accompanying memorandum of law, dated April 20, 2020;
3) Defendant's motion, pursuant to CPLR 3211(a)(1), for an order dismissing the complaint in its entirety and awarding Defendant costs and attorney's fees with accompanying memorandum of law, dated May 4, 2020;
4) Defendant's affirmation in opposition to Plaintiff's order to show cause, dated May 20, 2020;
5) Plaintiff's affirmation in opposition to Defendant's order to show cause, dated May 20, 2020; and
6) Plaintiff's affirmation in opposition to defendant's motion to dismiss, dated May 20, 2020; all of which submitted May 27, 2020.

Papers Considered:	Papers Numbered:
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	Plaintiff 1, 2, 3 [Exh. A-E]; Defendant 4, 5, 6, 7 [Exh. 1-7], 8 [Exh. 1-2], 10, 12 [Exh. 1-4];

Opposing Affidavits (Affirmations)	Defendant 13; Plaintiff 14, 15 [Exh. 1-10], 16, 17 [Exh. 1-10];
Reply Affidavits (Affirmations)	Defendant 18; Plaintiff 19;
Other (Memoranda of Law)	Defendant 9, 11.

Upon the foregoing cited papers, the Decision/Order is as follows: Defendant's motion (motion sequence number three) for an order dismissing the complaint is granted to the extent that the complaint is dismissed. Defendant's order to show cause (motion sequence number two) seeking to vacate the interim relief granted to Plaintiff is denied as moot since that relief has expired. The remainder of the order to show cause is also denied as moot. Plaintiff's order to show cause (motion sequence number one) is denied as moot.

Background

Pursuant to a franchise agreement dated August 27, 2018 (Franchise Agreement), defendant Paris Baguette Family, Inc. (Defendant), as franchisor, granted plaintiff Fang Zhang (Plaintiff), as franchisee, the right to operate a Paris Baguette bakery store in Brooklyn, New York. With Defendant's approval, Plaintiff leased a storefront at 5810 8th Avenue in Brooklyn, New York and opened the bakery store in August 2019. Defendant alleges that Plaintiff was in material default of the Franchise Agreement within weeks of opening. In a letter dated December 10, 2019, entitled "Notice of Default under Franchise Agreement" (the Default Notice), Defendant notified Plaintiff of a number of alleged violations of the Franchise Agreement related to, among other things, the dispossession of a portion of the premises by a former subtenant claiming rights in the property (Plaintiff 1; Plaintiff 2; Plaintiff 3 [Exh. A-E]; Defendant 4; Defendant 5; Defendant 6; Defendant 7 [Exh. 1-7]; Defendant 8 [Exh. 1-2]; Defendant 9; Defendant 10; Defendant 11; Defendant 12 [Exh. 1-4]; Defendant 13; Plaintiff 14; Plaintiff 15 [Exh. 1-10]; Plaintiff 16; Plaintiff 17 [Exh. 1-10]; Defendant 18; Plaintiff 19).

The Default Notice stated that the Franchise Agreement would automatically terminate if Plaintiff did not cure the defaults by December 15, 2019. The cure period was subsequently extended to December 19, 2019. On December 15, 2019, Plaintiff filed a voluntary title 11 bankruptcy petition resulting in an automatic stay preventing Defendant from exercising any rights or remedies under the Franchise Agreement.[1] Plaintiff's store remained open during this time and Defendant continued making deliveries to the store. By order dated March 20, 2020, the bankruptcy court modified the automatic stay to allow Defendant "to pursue its rights under applicable law with respect to the Franchise Agreement." Prior to the date the bankruptcy court order became effective, on March 24, 2020, Plaintiff notified Defendant by letter that all of the violations identified in the Default Notice had been cured. After conducting an inspection of the premises that allegedly revealed that Plaintiff failed to cure the defaults, by letter dated April 6, 2020, Defendant terminated the Franchise Agreement (the Termination Notice) (Plaintiff 1; Plaintiff 2; Plaintiff 3 [Exh. A-E]; Defendant 4; Defendant 5; Defendant 6; Defendant 7 [Exh. 1-7]; Defendant 8 [Exh. 1-2]; Defendant 9; Defendant 10; Defendant 11; Defendant 12 [Exh. 1-

[1] The parties' interpretation of the effect of the automatic bankruptcy stay differs. In addition to prohibiting Defendant from exercising its rights with respect to termination of the Franchise Agreement, Plaintiff claims that the cure period set forth in the Default Notice was extended or tolled during the pendency of the stay. Defendant contends that the stay merely prevented Paris Baguette from immediately effectuating the termination or otherwise exercising its rights under the Franchise Agreement.

4]; Defendant 13; Plaintiff 14; Plaintiff 15 [Exh. 1-10]; Plaintiff 16; Plaintiff 17 [Exh. 1-10]; Defendant 18; Plaintiff 19).

On April 8, 2020, Plaintiff commenced this action by filing of the summons and complaint seeking a declaratory judgment and injunctive relief in the form of an order directing Defendant to recall its termination, reinstate Plaintiff's franchise, and resume deliveries to Plaintiff's store. Plaintiff also seeks to recover actual and punitive damages for Defendant's alleged wrongful termination of the Franchise Agreement. The complaint asserts causes of action for declaratory and injunctive relief, breach of contract, unjust enrichment, breach of implied covenant of good faith and fair dealing, and fraud. Plaintiff moved by order to show cause on the same date for a preliminary injunction directing Defendant "to continue to provide goods and/or services" to Plaintiff's store under the Franchise Agreement pending the resolution of this matter. The order to show cause, which was signed on April 14, 2020, provided for temporary relief pending the hearing of the motion on May 27, 2020 in the form of an order restraining and enjoining Defendant from interfering with Plaintiff's franchise and supply deliveries to the store. The signed order to show cause further indicated:

> "ORDERED, that defendant may inspect the premises for health and safety issues within two days and may make an application to modify this order if plaintiff violates any health and safety codes that would otherwise result in the City of New York closing the restaurant for violations, or if plaintiff violates any new standards as a result of COVID-19 which are imposed and enforced on other franchisees by termination of the franchise agreement and which are otherwise considered commercially feasible…
>
> ORDERED, that plaintiff shall take all steps to immediately cure any and all violations issued by the NYC Department of Health, including but not limited to its inspection of December 18, 2019 (Violation Code 06C) of the premises located at 5810 8 Avenue, Brooklyn 11220" (Plaintiff 1; Plaintiff 2; Plaintiff 3 [Exh. A-E]; Defendant 4; Defendant 5; Defendant 6; Defendant 7 [Exh. 1-7]; Defendant 8 [Exh. 1-2]; Defendant 9; Defendant 10; Defendant 11; Defendant 12 [Exh. 1-4]; Defendant 13; Plaintiff 14; Plaintiff 15 [Exh. 1-10]; Plaintiff 16; Plaintiff 17 [Exh. 1-10]; Defendant 18; Plaintiff 19).

On April 15, 2020, in compliance with the order to show cause, Defendant allowed Plaintiff to submit an order for deliveries, which was fulfilled on April 17, 2020. At the time of the delivery, a representative of Defendant conducted an inspection of the store. Defendant claims that the inspection revealed that Plaintiff failed to remedy the violations or implement Paris Baguette's COVID-19 standards (Plaintiff 1; Plaintiff 2; Plaintiff 3 [Exh. A-E]; Defendant 4; Defendant 5; Defendant 6; Defendant 7 [Exh. 1-7]; Defendant 8 [Exh. 1-2]; Defendant 9; Defendant 10; Defendant 11; Defendant 12 [Exh. 1-4]; Defendant 13; Plaintiff 14; Plaintiff 15 [Exh. 1-10]; Plaintiff 16; Plaintiff 17 [Exh. 1-10]; Defendant 18; Plaintiff 19).

Upon discovery of Plaintiff's alleged noncompliance, Defendant moved by order to show cause for an order vacating Plaintiff's order to show cause. Defendant also sought an order staying or dismissing the case pursuant to CPLR 7503 and directing the parties to proceed with alternative dispute resolution. The order to show cause, which was signed on April 28, 2020, directed plaintiff to immediately cease operations at the store and stated that, pending the hearing, Defendant "is not required to make any deliveries to Plaintiff's store or otherwise provide any other service to Plaintiff under the

Franchise Agreement related to the continued operation of the franchise location" (Plaintiff 1; Plaintiff 2; Plaintiff 3 [Exh. A-E]; Defendant 4; Defendant 5; Defendant 6; Defendant 7 [Exh. 1-7]; Defendant 8 [Exh. 1-2]; Defendant 9; Defendant 10; Defendant 11; Defendant 12 [Exh. 1-4]; Defendant 13; Plaintiff 14; Plaintiff 15 [Exh. 1-10]; Plaintiff 16; Plaintiff 17 [Exh. 1-10]; Defendant 18; Plaintiff 19).

Prior to the return date of the orders to show cause, Defendant moved for an order pursuant to CPLR 3211(a)(1) dismissing the complaint on the ground that Plaintiff's claims are precluded by documentary evidence of controlling alternative dispute resolution and forum selection provisions in the Franchise Agreement (Plaintiff 1; Plaintiff 2; Plaintiff 3 [Exh. A-E]; Defendant 4; Defendant 5; Defendant 6; Defendant 7 [Exh. 1-7]; Defendant 8 [Exh. 1-2]; Defendant 9; Defendant 10; Defendant 11; Defendant 12 [Exh. 1-4]; Defendant 13; Plaintiff 14; Plaintiff 15 [Exh. 1-10]; Plaintiff 16; Plaintiff 17 [Exh. 1-10]; Defendant 18; Plaintiff 19).

The court will now address the arguments of the parties in their papers. With respect to her request for a preliminary injunction, Plaintiff argues that she has demonstrated a likelihood of success on the merits of her claim that Defendant improperly terminated the Franchise Agreement because Defendant failed to provide her with notice and an opportunity to cure the defaults prior to the termination. Plaintiff claims that the Termination Notice included three new violations that were not previously identified in the Default Notice that she had no opportunity to cure. Plaintiff asserts that she will suffer irreparable harm as a result of the termination and Defendant's refusal to make deliveries because she will be forced to close the store and furlough her employees while the matter is litigated (Plaintiff 1; Plaintiff 2; Plaintiff 3 [Exh. A-E]; Defendant 4; Defendant 5; Defendant 6; Defendant 7 [Exh. 1-7]; Defendant 8 [Exh. 1-2]; Defendant 9; Defendant 10; Defendant 11; Defendant 12 [Exh. 1-4]; Defendant 13; Plaintiff 14; Plaintiff 15 [Exh. 1-10]; Plaintiff 16; Plaintiff 17 [Exh. 1-10]; Defendant 18; Plaintiff 19).

In opposition and in support of its order to show cause, Defendant preliminarily notes that section 19(G) of the Franchise Agreement contains clear and binding alternative dispute resolution provisions obligating Plaintiff to participate in an internal dispute process, mediation, and arbitration in Los Angeles County, California prior to seeking judicial intervention. The Franchise Agreement notes that the alternative dispute resolution procedures "will survive the termination or expiration of [the Franchise Agreement]" (Plaintiff 1; Plaintiff 2; Plaintiff 3 [Exh. A-E]; Defendant 4; Defendant 5; Defendant 6; Defendant 7 [Exh. 1-7]; Defendant 8 [Exh. 1-2]; Defendant 9; Defendant 10; Defendant 11; Defendant 12 [Exh. 1-4]; Defendant 13; Plaintiff 14; Plaintiff 15 [Exh. 1-10]; Plaintiff 16; Plaintiff 17 [Exh. 1-10]; Defendant 18; Plaintiff 19).

Even if Plaintiff had complied with these procedures, Defendant argues that Plaintiff is precluded from litigating this action in a New York court due to the forum selection clause in the Franchise Agreement, which binds the parties to the exclusive jurisdiction of the state or federal courts of the Central District of California. Section 19(I) provides the following:

> "For any claims, controversies or disputes that may be brought to a court of law as provided in this agreement, franchisee and the principals hereby irrevocably submit themselves to the jurisdiction of the State and the Federal District Courts of the Central District of California. Franchisee and the principals hereby waive all questions of personal jurisdiction for the purpose of carrying out this provision… franchisee and the

principals further agree that venue for any such proceeding shall be in the Central District in the state of California" (Plaintiff 1; Plaintiff 2; Plaintiff 3 [Exh. A-E]; Defendant 4; Defendant 5; Defendant 6; Defendant 7 [Exh. 1-7]; Defendant 8 [Exh. 1-2]; Defendant 9; Defendant 10; Defendant 11; Defendant 12 [Exh. 1-4]; Defendant 13; Plaintiff 14; Plaintiff 15 [Exh. 1-10]; Plaintiff 16; Plaintiff 17 [Exh. 1-10]; Defendant 18; Plaintiff 19).

Defendant contends that Plaintiff failed to establish her entitlement to a preliminary injunction by demonstrating a likelihood of success on the merits, irreparable harm absent the injunction, and a balancing of equities in her favor (Plaintiff 1; Plaintiff 2; Plaintiff 3 [Exh. A-E]; Defendant 4; Defendant 5; Defendant 6; Defendant 7 [Exh. 1-7]; Defendant 8 [Exh. 1-2]; Defendant 9; Defendant 10; Defendant 11; Defendant 12 [Exh. 1-4]; Defendant 13; Plaintiff 14; Plaintiff 15 [Exh. 1-10]; Plaintiff 16; Plaintiff 17 [Exh. 1-10]; Defendant 18; Plaintiff 19).

With respect to the first element, Defendant contends that Plaintiff failed to demonstrate that Defendant's termination of the Franchise Agreement was improper. Notwithstanding its right to immediately terminate the Franchise Agreement,[2] Defendant argues that Plaintiff was timely notified of the defaults and given a reasonable opportunity to cure them, which she failed to do even after the initial extension and bankruptcy stay. In support, Defendant relies upon the affidavit of Jayson Scala, a district manager employed by Paris Baguette Family, Inc., who avers that he personally conducted an inspection of the store which revealed that Plaintiff failed to cure the violations of the Paris Baguette standards and NYC Health Code. Defendant contends that Plaintiff also failed to demonstrate that she will suffer irreparable harm or injury, as Plaintiff's damages arising out of the termination are monetary and readily quantifiable. Defendant asserts that Plaintiff failed to allege any damages of a noneconomic nature necessary to obtain equitable relief. Defendant claims that a balancing of the equities favors denial of the motion on the ground that Plaintiff's demonstrated inability to comply with health and safety standards and failure to operate her store in a manner consistent with the Franchise Agreement may negatively impact Paris Baguette's tradename and other franchisees (Plaintiff 1; Plaintiff 2; Plaintiff 3 [Exh. A-E]; Defendant 4; Defendant 5; Defendant 6; Defendant 7 [Exh. 1-7]; Defendant 8 [Exh. 1-2]; Defendant 9; Defendant 10; Defendant 11; Defendant 12 [Exh. 1-4]; Defendant 13; Plaintiff 14; Plaintiff 15 [Exh. 1-10]; Plaintiff 16; Plaintiff 17 [Exh. 1-10]; Defendant 18; Plaintiff 19).

In support of Defendant's order to show cause and motion to dismiss, Defendant reiterates and expands upon its argument that the Plaintiff's claims are precluded by the alternative dispute resolution and forum selection provisions in the Franchise Agreement. Defendant contends that the alternative dispute resolution and forum selection provisions within the Franchise Agreement constitute documentary evidence sufficient to provide a proper basis for dismissal of the complaint pursuant to CPLR 3211(a)(1). Even if Plaintiff had the right to bring an action in court without first exhausting the alternative dispute resolution process, Defendant argues that the Franchise Agreement specifically provides that the exclusive jurisdiction and venue of any action is the state or federal courts of the Central District of California. Defendant further contends that Plaintiff failed to demonstrate that the forum selection clause was unreasonable, unjust, invalid due to fraud, or in contravention of public policy (Plaintiff 1; Plaintiff 2; Plaintiff 3 [Exh. A-E]; Defendant 4; Defendant 5; Defendant 6; Defendant 7 [Exh. 1-7]; Defendant 8 [Exh. 1-2]; Defendant 9; Defendant 10; Defendant 11; Defendant 12 [Exh. 1-

[2] Defendant asserts that it was permitted to terminate the Franchise Agreement without providing Plaintiff with any opportunity to cure for the type of "material default" at issue here pursuant to section 17(C) Franchise Agreement, which enumerates instances where Defendant may terminate the agreement on notice with no opportunity to cure.

4]; Defendant 13; Plaintiff 14; Plaintiff 15 [Exh. 1-10]; Plaintiff 16; Plaintiff 17 [Exh. 1-10]; Defendant 18; Plaintiff 19).

In opposition, Plaintiff argues that the violations in the Default Notice and Termination Notice were previously cured and that she was in the process of implementing the COVID-19 related standards when the inspection occurred. She claims that Defendant's stated reason for the termination of the franchise for violation of health and safety standards is pretextual. Plaintiff further argues that defendant waived its right to mediation and arbitration under the Franchise Agreement on the ground that it failed to notify Plaintiff of its intent to seek mediation or arbitration of her claims. Plaintiff also asserts that mediation would be fruitless or ineffectual (Plaintiff 1; Plaintiff 2; Plaintiff 3 [Exh. A-E]; Defendant 4; Defendant 5; Defendant 6; Defendant 7 [Exh. 1-7]; Defendant 8 [Exh. 1-2]; Defendant 9; Defendant 10; Defendant 11; Defendant 12 [Exh. 1-4]; Defendant 13; Plaintiff 14; Plaintiff 15 [Exh. 1-10]; Plaintiff 16; Plaintiff 17 [Exh. 1-10]; Defendant 18; Plaintiff 19).

With respect to the forum selection clause, Plaintiff argues that Defendant waived any arguments related to forum by filing its own order to show cause. Plaintiff argues that any change of forum should be denied because of the risks involved with traveling during the COVID-19 pandemic. Plaintiff also contends that the doctrine of forum non conveniens favors litigation of the matter in New York (Plaintiff 1; Plaintiff 2; Plaintiff 3 [Exh. A-E]; Defendant 4; Defendant 5; Defendant 6; Defendant 7 [Exh. 1-7]; Defendant 8 [Exh. 1-2]; Defendant 9; Defendant 10; Defendant 11; Defendant 12 [Exh. 1-4]; Defendant 13; Plaintiff 14; Plaintiff 15 [Exh. 1-10]; Plaintiff 16; Plaintiff 17 [Exh. 1-10]; Defendant 18; Plaintiff 19).

Defendant did not file a reply (Plaintiff 1; Plaintiff 2; Plaintiff 3 [Exh. A-E]; Defendant 4; Defendant 5; Defendant 6; Defendant 7 [Exh. 1-7]; Defendant 8 [Exh. 1-2]; Defendant 9; Defendant 10; Defendant 11; Defendant 12 [Exh. 1-4]; Defendant 13; Plaintiff 14; Plaintiff 15 [Exh. 1-10]; Plaintiff 16; Plaintiff 17 [Exh. 1-10]; Defendant 18; Plaintiff 19).

Discussion

A motion pursuant to CPLR 3211(a)(1) to dismiss the complaint on the basis of documentary evidence may be appropriately granted where the documentary evidence utterly refutes the plaintiff's allegations, conclusively establishing a defense as a matter of law (*see Cassese v SVJ Joralemon, LLC*, 168 AD3d 667, 668 [2d Dept 2019]; *Xia-Ping Wang v Diamond Hill Realty, LLC*, 116 AD3d 767, 767-768 [2d Dept 2014], citing Goshen v Mutual Life Ins. Co. of N.Y., 98 NY2d 314, 326 [2002]; *Schiller v Bender, Burrows and Rosenthal LLP*, 116 AD3d 756, 757 [2d Dept 2014]). Materials that qualify as documentary evidence include judicial records and "documents reflecting out-of-court transactions such as mortgages, deeds [and] contracts" (*S & J Serv. Ctr., Inc. v Commerce Commercial Group, Inc.*, 178 AD3d 977, 978 [2d Dept 2019]; *Fontanetta v John Doe 1*, 73 AD3d 78, 84-85 [2d Dept 2010]; *Xia-Ping Wang v Diamond Hill Realty, LLC*, at 768).

A valid contractual forum selection clause providing that any dispute under the relevant agreement must be litigated in the courts of a state other than New York is documentary evidence that may provide a proper basis for dismissal pursuant to CPLR 3211(a)(1) (*see Lowenbraun v McKeon*, 98 AD3d 655, 656 [2d Dept 2012]; *Lischinskaya v Carnival Corp.*, 56 AD3d 116, 123 [2d Dept 2008]). An agreement to arbitrate a dispute is not a defense to an action brought on that dispute and, thus, may not

be the basis for a motion to dismiss based on documentary evidence (*see C & M 345 N. Main St., LLC v Nikko Constr. Corp.*, 96 AD3d 794, 795 [2d Dept 2012]; *Curran v Estate of Curran*, 87 AD3d 607, 607 [2d Dept 2011] [agreement to arbitrate is not "documentary evidence" because remedy of party seeking arbitration is to move to compel arbitration]).

Parties to a contract may freely select a forum which will resolve any disputes over the interpretation or performance of the contract (*see Creative Mobile Technologies, LLC v Smart Modular Technologies, Inc.*, 97 AD3d 626, 626 [2d Dept 2012], quoting *Brooke Group v JCH Syndicate 488*, 87 NY2d 530, 534 [1996]). "A contractual forum selection clause is prima facie valid and enforceable unless it is shown by the challenging party to be unreasonable, unjust, in contravention of public policy, invalid due to fraud or overreaching, or it is shown that a trial in the selected forum would be so gravely difficult that the challenging party would, for all practical purposes, be deprived of its day in court" (*Puleo v Shore View Ctr. for Rehabilitation & Health Care*, 132 AD3d 651, 652 [2d Dept 2015], quoting *KMK Safety Consulting, LLC v Jeffrey M. Brown Assoc., Inc.*, 72 AD3d 650, 651 [2d Dept 2010] [internal quotation marks omitted]; *Pratik Apparels, Ltd. v Shintex Apparel Grp., Inc.*, 96 AD3d 922, 923 [2d Dept 2012]).

A forum selection clause is mandatory when it includes obligatory language binding the parties to a particular forum (*see Brooke Group v JCH Syndicate 488*, 87 NY2d at 534). By contrast, a permissive forum selection clause only reflects the contracting parties' consent to resolve disputes in a certain forum, but does not require the resolution of disputes in that forum (*see Trump v Deutsche Bank Trust Co. Americas*, 65 AD3d 1329, 1331-1332 [2d Dept 2009]; 2 N.Y. Prac., Com. Litig. in New York State Courts § 13:4 [4th ed.] ["Types of forum selection clauses"]). "The applicability of a forum selection clause does not depend on the nature of the underlying action… Rather, it is the language of the forum selection clause itself that determines which claims fall within its scope" (*see Couvertier v Concourse Rehabilitation & Nursing, Inc.*, 117 AD3d 772, 773 [2d Dept 2014]).

Here, the forum selection clause is mandatory because it grants exclusive jurisdiction to a particular forum and incorporates obligatory venue language requiring that the parties litigate any disputes arising out of the Franchise Agreement in California (*see Trump v Deutsche Bank Trust Co. Americas*, 65 AD3d at 1330 [forum selection clause deemed mandatory where it provided that party "irrevocably submit[ted]" to the jurisdiction of court]; *Morrow v Nationwide Mut. Fire Ins. Co.*, 2015 NY Slip Op 32850[U], 13 [Sup Ct, New York County 2015] [forum selection clause mandatory where parties "irrevocably consent[ed]" to jurisdiction of court]). As set forth above, the forum selection clause in Section 19(I) provides that "for any claims, controversies or disputes that may be brought to a court of law as provided in [the Franchise Agreement], Franchisee and the Principals hereby irrevocably submit themselves to the jurisdiction of the State and the Federal District Courts of the Central District in the State of California… Franchisee and Principals further agree that venue for any such proceeding shall be in the Central District in the State of California." The obligatory language used in the forum selection clause is broad and all encompassing, and is applicable to the disputes regarding the termination of the Franchise Agreement at issue here (*see Couvertier v Concourse Rehabilitation & Nursing, Inc.*, 117 AD3d at 773) (Plaintiff 1; Plaintiff 2; Plaintiff 3 [Exh. A-E]; Defendant 4; Defendant 5; Defendant 6; Defendant 7 [Exh. 1-7]; Defendant 8 [Exh. 1-2]; Defendant 9; Defendant 10; Defendant 11; Defendant 12 [Exh. 1-4]; Defendant 13; Plaintiff 14; Plaintiff 15 [Exh. 1-10]; Plaintiff 16; Plaintiff 17 [Exh. 1-10]; Defendant 18; Plaintiff 19).

While sections 19(I) and 19(J) of the Franchise Agreement permit Defendant as franchisor to apply for injunctive relief "from any court of competent jurisdiction," they do not afford Plaintiff the same relief (Plaintiff 1; Plaintiff 2; Plaintiff 3 [Exh. A-E]; Defendant 4; Defendant 5; Defendant 6; Defendant 7 [Exh. 1-7]; Defendant 8 [Exh. 1-2]; Defendant 9; Defendant 10; Defendant 11; Defendant 12 [Exh. 1-4]; Defendant 13; Plaintiff 14; Plaintiff 15 [Exh. 1-10]; Plaintiff 16; Plaintiff 17 [Exh. 1-10]; Defendant 18; Plaintiff 19).

The court rejects Plaintiff's contention that the court should not enforce the forum selection clause. Plaintiff's arguments based on forum non conveniens grounds are without merit because she agreed to submit herself to the jurisdiction of the California courts as provided in the Franchise Agreement and expressly waived any arguments as to personal jurisdiction (*see, e.g., Brooke Group Ltd. v JCH Syndicate 488*, 87 NY2d at 534; *Trump v Deutsche Bank Trust Co. Americas*, 65 AD3d at 1330; *Lischinskaya v Carnival Corp.*, 56 AD3d at 122 [the court "had no authority to grant discretionary relief to the plaintiff pursuant to CPLR 327 once it determined that the [forum selection clause] required that the complaint be dismissed"]; *Honeywell Intern. Inc. v ARC Energy Services, Inc.*, 152 AD3d 444, 444 [1st Dept 2017] [where party to contract agreed to forum selection clause, it is precluded from attacking court's jurisdiction on forum non conveniens grounds]). Plaintiffs failed to otherwise demonstrate that forum selection clause is unreasonable, unjust, in contravention of public policy, or invalid due to fraud or overreaching, or that a trial in the selected forum would be so difficult that Plaintiff would effectively be deprived of her day in court (*see Pratik Apparels, Ltd. v Shintex Apparel Grp., Inc.*, 96 AD3d at 923-924]) (Plaintiff 1; Plaintiff 2; Plaintiff 3 [Exh. A-E]; Defendant 4; Defendant 5; Defendant 6; Defendant 7 [Exh. 1-7]; Defendant 8 [Exh. 1-2]; Defendant 9; Defendant 10; Defendant 11; Defendant 12 [Exh. 1-4]; Defendant 13; Plaintiff 14; Plaintiff 15 [Exh. 1-10]; Plaintiff 16; Plaintiff 17 [Exh. 1-10]; Defendant 18; Plaintiff 19).

While the COVID-19 pandemic has presented challenging circumstances for litigants, the parties remain constrained by the express provisions of the Franchise Agreement to which they agreed upon. Plaintiff has failed to demonstrate, or even argue, that the contractually specified forum is unavailable due to the COVID-19 pandemic (*see Conduent Business Services v Skyview Capital*, C.A. No. 2020-0232-JTL, Transcript Ruling, at 33-34 [Del Ch Mar. 30, 2020] [due to the closure of New York's courts to commercial disputes as a result of the COVID-19 pandemic, the chosen forum was unavailable for Conduent to seek preliminary injunctive relief; it was undisputed that Conduent first sought guidance from the New York court, but was informed that commercial disputes are not considered "essential" and therefore precluded from seeking relief in the contractually specified forum]) (Plaintiff 1; Plaintiff 2; Plaintiff 3 [Exh. A-E]; Defendant 4; Defendant 5; Defendant 6; Defendant 7 [Exh. 1-7]; Defendant 8 [Exh. 1-2]; Defendant 9; Defendant 10; Defendant 11; Defendant 12 [Exh. 1-4]; Defendant 13; Plaintiff 14; Plaintiff 15 [Exh. 1-10]; Plaintiff 16; Plaintiff 17 [Exh. 1-10]; Defendant 18; Plaintiff 19).

With respect to the argument that Defendant failed to timely raise the forum selection clause, the record is clearly to the contrary as Defendant properly and timely moved to dismiss the action pursuant to CPLR 3211(a)(1) (*see* CPLR 3211(e); *Lischinskaya v Carnival Corp*, at 123; *cf. CDR Créances S.A.S v Cohen*, 77 AD3d 489, 490 [1st Dept 2010] [forum selection clause waived by defending an action on the merits]). Defendant also argued that Plaintiff's order to show cause should be denied because of the forum selection clause in its own order to show cause and during the telephone conference held with the court on April 21, 2020. The court notes that Plaintiff failed to annex a copy of the Franchise Agreement to her order to show cause and did not mention or address the forum selection clause in the attorney

affirmation or affidavit in support (Plaintiff 1; Plaintiff 2; Plaintiff 3 [Exh. A-E]; Defendant 4; Defendant 5; Defendant 6; Defendant 7 [Exh. 1-7]; Defendant 8 [Exh. 1-2]; Defendant 9; Defendant 10; Defendant 11; Defendant 12 [Exh. 1-4]; Defendant 13; Plaintiff 14; Plaintiff 15 [Exh. 1-10]; Plaintiff 16; Plaintiff 17 [Exh. 1-10]; Defendant 18; Plaintiff 19).

Defendant's application for attorneys' fees and costs is denied as Defendant has not demonstrated that the Plaintiff's commencement of this action was frivolous or that her arguments without reasonable basis in law within the meaning of 22 NYCRR 130-1.1 (Plaintiff 1; Plaintiff 2; Plaintiff 3 [Exh. A-E]; Defendant 4; Defendant 5; Defendant 6; Defendant 7 [Exh. 1-7]; Defendant 8 [Exh. 1-2]; Defendant 9; Defendant 10; Defendant 11; Defendant 12 [Exh. 1-4]; Defendant 13; Plaintiff 14; Plaintiff 15 [Exh. 1-10]; Plaintiff 16; Plaintiff 17 [Exh. 1-10]; Defendant 18; Plaintiff 19).

Because this action is dismissed on the basis of the forum selection clause, it is not necessary to reach the additional grounds advanced in support of dismissal. The court does not reach Plaintiff's contention that Defendant waived its right to mediation and arbitration by failing to notify her of its intention to proceed with the alternative dispute resolution process as required by the pertinent provisions of the Franchise Agreement (Plaintiff 1; Plaintiff 2; Plaintiff 3 [Exh. A-E]; Defendant 4; Defendant 5; Defendant 6; Defendant 7 [Exh. 1-7]; Defendant 8 [Exh. 1-2]; Defendant 9; Defendant 10; Defendant 11; Defendant 12 [Exh. 1-4]; Defendant 13; Plaintiff 14; Plaintiff 15 [Exh. 1-10]; Plaintiff 16; Plaintiff 17 [Exh. 1-10]; Defendant 18; Plaintiff 19).

Conclusion

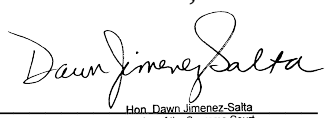
Defendant's motion to dismiss pursuant to CPLR 3211(a)(1) on the basis of the forum selection clause in the Franchise Agreement is granted to the extent that the complaint is dismissed. Defendant's application for attorneys' fees and costs is denied. Defendant's order to show cause seeking to vacate the interim relief granted to Plaintiff is denied as moot since that relief has expired. The remainder of the order to show cause is also denied as moot. Plaintiff's order to show cause is denied as moot.

This constitutes the decision and order of the court.

Dated: June 8, 2020
Brooklyn, New York

Fang Zhang v Paris Baguette Family, Inc.
Index No. 507099/2020

E N T E R,



Dawn Jimenez-Salta, J.S.C.