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| Matter of Matthews v Symbion Power LLC |
| 2020 NY Slip Op 32701(U) |
| January 28, 2020 |
| Supreme Court, New York County |
| Docket Number: 653331/2019 |
| Judge: Barry Ostrager |
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. BARRY R. OSTRAGER PART IAS MOTION 61EFM

Justice

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SIMON MATTHEWS

Plaintiff,

- v -

SYMBION POWER LLC,

Defendant.

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INDEX NO. 653331/2019

MOTION DATE

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 50, 51 were read on this motion to/for DISMISS

The defendant's motion to dismiss is granted in part and denied in part. Briefly, this is a dispute relating to plaintiff's claim for compensation pursuant to written contracts entered into in 2009 and 2011 between the plaintiff, a British domiciliary, and Symbian Power Company (Symbion Europe") as well as an alleged oral contract between the plaintiff and a representative of Symbion Power LLC. ("Symbion"). Symbion and Symbion Europe are subsidiaries companies of Symbion Holdings, Ltd. The plaintiff has a minority interest in Symbion Holdings, Ltd and is thus familiar with the corporate structure of the various Symbion entities.

The plaintiff has a claim pending in Delaware Chancery Court against Symbion Holdings Ltd. Symbion Europe has apparently initiated an action in Cyprus related to plaintiff's contract with Symbian Europe. Plaintiff's contract with Symbion Europe contains a Cyprus choice of law provision as well as a consent to jurisdiction in Cyprus provision. This action is solely against Symbian, which is a Delaware corporation with its principal place of business in New York. The Cyprus action appears to have been initiated in retaliation for the filing of the action in this Court.

Manifestly, defendant's motion to dismiss on *forum non conveniens* grounds must be denied because there has been no showing that Symbian is amenable to jurisdiction in Cyprus and consequently there has been no showing that plaintiff has an alternative choice of forum. Symbian is subject to jurisdiction in New York.

The defendant has moved to dismiss the contract claims on various grounds, including the applicable statute of limitations. Since Symbion is not a signatory to the 2009 and 2011 contracts, those claims must be dismissed. Plaintiff argues that he may assert these claims against Symbion based on an alleged agency relationship between Symbion and Symbion Europe. However, plaintiff has not plead this assertion with sufficient specificity; as plaintiff would have to allege, at a minimum, that Symbion completely dominates and control Symbion Europe. Thus, as a matter of law, plaintiff cannot assert a claim against Symbian pursuant to a contract plaintiff entered into with Symbian Europe. Although plaintiff submitted documentation that plaintiff's work was supervised by Symbian, plaintiff cannot have a breach of contract claim against Symbian pursuant to a contract that he knowingly entered into with Symbian Europe.

On the other hand, plaintiff's oral contract claim, which is based upon an alleged agreement with the head of Symbian cannot be dismissed on this motion. Similarly, under the applicable standards on a CPLR Section 3211 motion, plaintiff's quasi-contract claims, which are plead in the alternative to his breach of contract claims, cannot be dismissed on this motion. There are sufficient issues of fact pled to preclude dismissal on 3211 statute of limitations grounds. Thus, insofar as the defendant seeks to dismiss plaintiff's oral contract claim and quasi-contract claims, the motion is denied without prejudice to renewal as a motion

for summary judgment at the conclusion of discovery. The balance of defendant's motion to dismiss is denied for the reasons stated above.

Accordingly, it is hereby

ORDERED that Defendant's motion to dismiss is granted in part and denied in part; and it is further

ORDERED that the Clerk dismiss and sever plaintiff's first and second causes of action from the Complaint; and it is further

ORDERED that Defendant answer the complaint within thirty days of this Decision & Order; and it is further

ORDERED that the parties appear for a preliminary conference on March 31, 2020 at 9:30 a.m.

1/28/2020
DATE

Barry R. Ostrager
BARRY R. OSTRAGER, J.S.C.

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

BARRY R. OSTRAGER
JSC