SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LAURENCE L. LOVE** **PART** **IAS MOTION 63M**

Justice

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LYNNE DAVIS & CO., LLC,

Plaintiff,

- v -

THE BESPOKE COMPANY, BESPOKE PARIS, LLC

Defendants.

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INDEX NO. 657308/2019

MOTION DATE 10/23/2020

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 15, 16, 17, 18, 19, 20, 21, 22, 23

were read on this motion to/for DISMISS.

Upon the foregoing documents, it is

The following read on defendants' motion to dismiss the complaint, CPLR 3211(a)(7), for failure to state a cause of action; and CPLR 3211(a)(8), the court does not have jurisdiction of the person of the defendants. Plaintiff's complaint states a cause of action for breach of contract and for damages to be determined at trial.

A summons with notice was filed on December 9, 2019 and a notice of appearance for defendants was filed on January 27, 2020. A complaint was filed on February 24, 2020 and defendants moved to dismiss on or about May 14, 2020.

Plaintiff Lynne Davis & Co., LLC ("Lynne Davis") is a marketing professional in the luxury brands industry. The Bespoke Company, and Bespoke Paris, LLC are manufacturers of customized luxury goods. The Bespoke Company is based in Paris, France, and Bespoke Paris, LLC is based in Florida. Allegedly, the parties agreed that Lynne Davis would market and sell Bespoke luxury goods to various luxury hotels, travel companies, and other corporate entities.

On a motion to dismiss based upon documentary evidence, defendant must present evidence which "utterly refutes" plaintiff's allegations and establishes a defense as a matter of law (see *Goshen v. Mut. Life Ins. Co.*, 98 N.Y.2d 314 [2002]). In a breach of contract action, a plaintiff must plead, 1) formation of a contract between plaintiff and defendant, 2) performance by plaintiff, 3) defendant's failure to perform, and 4) resulting damage (see *U.S. Nonwovens Corp. v. Pack Line Corp.*, 4 N.Y.S.3d 868, 872 [N.Y. Sup. Ct, Mar. 2015]).

The affirmation of plaintiff states, "Ms. Davis is the owner and operator of Lynne Davis & Co. LLC, the New York limited liability company through which she does business. In or around July 16, Phillipe Boerio contacted Ms. Davis for assistance with business generation. Boerio, with Emmanuel de Nanclas own and operate Bespoke."

Defendants state, "[t]he complaint does not allege that plaintiff was a party to the initial oral agreement. The complaint also does not provide any specific factual allegation that both Bespoke and Bespoke LLC were parties to the oral agreement. In fact, the complaint makes clear that it was Bespoke, in France, that wanted to retain Ms. Davis."

Defendants continue, "[i]n January 2017 the same parties to the 2016 oral agreement exchanged emails purportedly constituting an agreement. The complaint does not allege that any of the negotiations of the 2017 (sic) took place in New York or were intended to affect New York in particular."

The co-founder and President of the Bespoke Company (located in France), Emmanuel de Nanclas affirms, "[i]n 2017, the Company agreed with Ms. Davis that she would receive an introduction fee of $200, a commission of 10% on all orders placed by clients introduced to us by Ms. Davis and 8% on re-orders. The Company did not agree that the 8% re-order fee would be paid on reorders indefinitely after the termination of our agreement with Ms. Davis. We did

not agree that Ms. Davis would receive referral fees on clients introduced to the Company by Ms. Davis."

Emmanuel de Nanclas continues, "[a]s of May 4, 2018, the date of termination of the agreement between The Bespoke Group and Ms. Lynn Davis, there were three transactions in progress for which origination credit was given to Ms. Davis. These transactions concerned orders by the Peninsula NYC, The Breakers, and Estee Lauder/La Mer. The orders placed were for €34,000, €42,000, and €145,041 respectively. Ms. Davis was entitled to a 10% commission on these orders. Her commission for the Peninsula was paid on August 23, 2018 and her commission for The Breakers was paid on June 26, 2018. Bespoke had received full payment from Estee Lauder/La Mer by June 5, 2019 and was prepared to make payment to Ms. Davis."

Plaintiff's affirmation alleges "Bespoke did not keep Ms. Davis apprised of discussions with clients by either keeping her copied on communications or sending her those communications. As a result, Ms. Davis often needed to inquire about the status of orders – whether a client had placed an order (and if so, for which products and for what amount), or whether a client had tendered payment to Bespoke."

In opposing a motion under CPLR 3211(a)(8), a plaintiff "need only demonstrate that facts may exist to exercise personal jurisdiction over the defendant" (see *Ying Jun Chen v. Lei Shi*, 19 A.D.3d 407, 408 [2nd Dep't 2005]).

Defendants also state the purported agreement violates the Statute of Frauds. "Plaintiff alleges that Ms. Davis was to receive a commission on orders and reorders, and, although there is nothing to this effect anywhere in the emails between the parties, that commissions on reorders were meant to last indefinitely, notwithstanding the termination of the agreement. Such a provision violates the Statute of Frauds and is void as illusory. The complaint further alleges

that, although the agreement did not mention referral fees, there was an unwritten, oral side agreement that Ms. Davis would receive commissions on referral business. The terms of this side agreement, including the amount of commissions and the duration of the agreement, are hopelessly vague and indefinite."

The Statute of Frauds has long been interpreted by New York Courts as only applying to contracts which by their terms "have absolutely no possibility in fact and law of full performance within one year" (see *Cron v. Hargro Fabrics, Inc.*, 91 N.Y.2d 362, 366 [1998]). "As long as the agreement may be fairly and reasonably interpreted such that it may be performed within a year, the statute of Frauds will not act as a bar however unexpected, unlikely, or even improbably that such performance will occur during that time frame" (*Id*).

On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction … [and the court is to] accept the facts as alleged in the complaint as true, accord petitioners the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (see *Leon v. Martinez*, 84 N.Y.2d 83, 87 – 88 [1994]).

The affidavits of the parties establish that an agreement existed, that defendants availed themselves of New York State by emailing plaintiff and inquiring as to whether Ms. Davis "could help [Bespoke] on the US market of luxury hotels."

ORDERED that defendants' motion to dismiss is denied.

12/1/2020
DATE

LAURENCE L. LOVE, J.S.C.

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

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