SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. PHILLIP HOM** **PART** **IAS MOTION 2**

Justice

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ISK BUSINESS TECHNOLOGY LLC,JANE YUN,

Plaintiff,

- v -

MIZUHO SECURITIES USA LLC,MIZUHO CAPITAL MARKETS LLC,PRECISION INITIATIVE TECHNOLOGY CORP., HELEN CAWLEY, JOHN SPINELLI, DAVID POWER, MICHAEL CORINO

Defendant.

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INDEX NO. 652559/2019

MOTION DATE N/A, N/A

MOTION SEQ. NO. 004 005

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 004) 81, 82, 83, 116, 123, 125, 126

were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 005) 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 113, 117, 118, 119, 120, 121, 122, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153

were read on this motion to/for DISMISSAL.

Defendants move to dismiss Plaintiffs' Third Amended Complaint, ("TAC") with prejudice, under CPLR §§3211(a)(1), (2), (7), and (8) based upon documentary evidence and for bringing this action in the incorrect forum under CPLR §327(a).

Upon the foregoing documents, it is ORDERED that Motion Sequence Number 4 by Defendants Mizuho Securities USA LLC, Mizuho Capital Markets LLC, and Michael Corino ("the Mizuho Defendants"), to dismiss the TAC is granted and the TAC is dismissed against the Mizuho Defendants.

It is further ORDERED that Motion Sequence Number 5 by Defendants Precision Initiative Technology Corp. and Helen Cawley (the "Precision Defendants") to dismiss the TAC is granted and the TAC is similarly dismissed against the Precision Defendants.

The Parties

Defendant Mizuho Securities USA LLC ("MSUSA") is a foreign limited liability company whose principal place of business is 320 Park Avenue, 12th Floor, New York, New York (NYSCEF Doc. No. 64 ¶5). MSUSA is a broker-dealer with the Securities and Exchange Commission and a futures commission merchant with the Commodity Futures Trading Commission ("CFTC") (NYSCEF Doc. No. 83 ¶12). Defendant Mizuho Capital Markets LLC ("MCM") is a foreign limited liability company whose principal place of business is 1440 Broadway, 25th Floor, New York, New York (NYSCEF Doc. No. 64 ¶7). MCM provisionally registered as a swap dealer with the CFTC (NYSCEF Doc. No. 83 ¶12). Defendant Michael Corino ("Corino") is employed by MSUSA (NYSCEF Doc. No. 64 ¶19).

Defendant Precision Initiative Technology Corp. ("Precision") is a domestic corporation whose principal place of business is 100 Merrick Road, Suite 514W, Rockville Centre, New York (*Id.* ¶10). Defendant Helen Cawley ("Cawley") is the Managing Partner and Director of Operations at Precision (NYSCEF Doc. No. 83 at 1). Cawley is domiciled in Austin, Texas (NYSCEF Doc. No. 64 ¶12).

Plaintiff ISK Business Technology LLC ("ISK") is a domestic limited liability company comprised solely of ISK's principal, Plaintiff Jane Yun ("Yun") (*Id.* ¶3). Both ISK's principal place of business and Yun's residence are in Brooklyn, New York (*Id.*¶3 and 4).

Background

In July 2017, MSUSA and Precision entered into a Master Consultancy Agreement ("MCA") (NYSCEF Doc. No. 82, Ex. 1 ¶ 1). Under the MCA, Precision would provide consultancy services to MSUSA as agreed upon in "schedules" issued under the terms of the MCA (*Id.* ¶ 1.1). Precision would be responsible for the payment of all fees, expenses, costs, and benefits owed to the consultant supplied to MSUSA by schedule (*Id.* ¶ 6.2). Further, "[n]either [Precision] nor its employees shall be entitled to any compensation or benefits from MSUSA . . . .," (*Id.* ¶ 6.3) other than the monthly fees MSUSA paid Precision for its services (*Id.* ¶ 6.1).

On July 27, 2017, Precision and ISK entered into a Subcontract Agreement (the "Agreement") (NYSCEF Doc. No. 2). Under the Agreement, Precision would assign ISK work through work orders specifying the type of service and dates of service, as well as the authorized time of each assignment (*Id.* at clause 1). The Agreement also provided, among other things, that:

- Precision is responsible for financially compensating ISK for services rendered (*Id.* at clause 3);
- ISK is an independent contractor and is not a Precision employee (*Id.* at clause 4);
- ISK agrees to indemnify Precision for any liability, causes of action, claims, or judgment which "arises out of or is in any way connected directly or indirectly with performance of work under this subcontract." (*Id.* at clause 10);
- It can be amended only by written agreement executed by ISK and Precision (*Id.* at clause 12); and

- It is governed by Massachusetts law and both ISK and Precision agree and consent that any litigation would be instituted in Massachusetts, and that both parties consent to the jurisdiction of Massachusetts state courts (*Id.*).

The agreement was signed by Yun and Cawley. (*Id.* at 3).

Also, on July 27, 2017, Precision issued ISK a work order to provide services for "Mizuho Securities and its affiliate Mizuho Capital" (*Id.,* Ex. A). The start date was August 7, 2017 for a duration of six months (*Id.*). The rate was "$800 8 hour professional day. Any additional time must be pre approved (sic) by the client" (*Id.*). The invoicing terms were described as monthly billing at net thirty days (*Id.*). The work order was signed by Yun and Cawley (*Id.*).

Plaintiffs are suing the Defendants, alleging, among other things:

- Yun has not been fully compensated for her work according to her contractual agreements with Precision;
- the Mizuho Defendants are a hiring party pursuant to the New York City Freelance Isn't Free Act ("FIFA") and that Yun was an employee of the Mizuho Defendants and of the Precision Defendants under the New York Labor Law ("NYLL");
- Both the Mizuho Defendants and the Precision Defendants are liable for Yun's alleged withheld compensation;
- the Mizuho Defendants and the Precision Defendants retaliated against ISK for engaging in activities protected by FIFA and NYLL by terminating Yun; and
- the Precision Defendants made retaliatory threats against Yun by seeking to enforce the Subcontract Agreement's indemnification clause unless she withdrew her complaint.

The Mizuho Defendants and the Precision Defendants filed their motions to dismiss on January 6, 2020.

Among the Mizuho Defendants' arguments is that there is documentary evidence supporting their motion to dismiss and the case is in the wrong court because of a forum selection clause in the Subcontract Agreement between Precision and ISK that provides any litigation is to be instituted in Massachusetts. (NYSCEF Doc. No. 82 ¶ 12). ISK opposes the motion, arguing that the forum selection clause is unenforceable under FIFA, which provides that a freelance worker may bring an action in any court of competent jurisdiction (NYSCEF Doc. No. 116 at 7-8; §20-933). ISK argues a freelance worker may bring an action in any court of competent jurisdiction most convenient to such worker (*Id.*). The Mizuho Defendants' responding memorandum rejects Plaintiffs' assertion that the forum selection clause is unenforceable and that FIFA mandates that a freelance worker may bring an action in the court of her choice (NYSCEF Doc. No. 125 at 3-5).

The Precision Defendants move to dismiss also arguing, among other things, that the Subcontract Agreement's forum selection clause requires this action to be brought in Massachusetts (NYSCEF Doc. No. 111, 152). In support of their motion, the Precision Defendants submitted a memorandum of law with affidavits from Cawley and Corino (NYSCEF Doc. No. 84, 113, 152). Plaintiffs similarly oppose the motion arguing that the forum selection clause in unenforceable under FIFA and that a freelance worker may bring an action in any court of competent jurisdiction (*See id.* at 7-8; §20-933). ISK interprets this to mean that a freelance worker may bring an action in the forum most convenient to such worker (*Id.*).

The Precision Defendants assert that FIFA does not forbid forum selection clauses in New York, nor does FIFA give New York exclusive jurisdiction over cases involving freelance

workers (NYSCEF Doc. No. 122 at 3-5). The Precision Defendants argue that, therefore, the forum selection clause in the Subcontract Agreement must be enforced (NYSCEF Doc. No. 122 at 2-5).

Motion to Dismiss

Whether a plaintiff can ultimately establish its allegations is not taken into consideration in determining a motion to dismiss (*Philips S. Beach, LLC v ZC Specialty Ins. Co.*, 55 AD3d 493 [1st Dept 2008]; *African Diaspora Mar. Corp. v Golden Gate Yacht Club, supra* at 211). On a motion to dismiss the complaint, "the pleading is to be afforded liberal construction" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). However, CPLR §3211(a)(1) warrants dismissal of a cause of action where the court finds that the documentary evidence presented conclusively establishes a defense to the asserted claims as a matter of law (*150 Broadway N.Y. Assocs. L.P. v Bodner*, 14 AD3d 1, 5 [1st Dept 2004]). A forum selection clause within a contract may be considered documentary evidence that may establish a basis for dismissal under CPLR §3211(a)(1) (*Somerset Fine Home Bldg., Inc. v Simplex Indus., Inc.*, 2018 N.Y. Misc. Lexis 6121 (Sup. Ct. NY Co. 2018 *citing Lischinskaya v. Carnival Corp.*, 56 A.D.3d 116, 123 [2d Dept. 2008]).

Forum Selection Clauses

In New York, a court may dismiss an action that should have been heard in a different forum under CPLR §327(a). Under this statute, a case could be dismissed where the parties agreed to a choice of forum provision in a contract. Moreover, in New York, a written forum selection clause that is agreed upon before an action is commenced will be enforced if a party

moves to change the trial venue accordingly under CPLR §501. The statutes demonstrate New York's policy of favoring and enforcing forum selection causes.

In 1972, the United States Supreme Court held that forum selection clauses are *prima facie* valid and should be enforced unless enforcement is demonstrated to be unreasonable or unjust (*M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 10 [1972](citation omitted)). The New York Court of Appeals adopted this standard in *Brooke Group Ltd. v. JCH Syndicate 488*, 87 N.Y.2d 530, 534 [1996]. The Court of Appeals has held that forum selection clauses provide "certainty and predictability" while resolving disputes (*Boss v. Am. Express Fin. Advisors, Inc.*, 6 N.Y.3d 242, 247 [2006], quoting *Brooke Group Ltd*, 87 N.Y.2d at 534). The First Department held that forum selection clauses were *prima facie* valid before *Brooke Group Ltd.* was decided and has continued to uphold this standard in its decisions *(See e.g. British W. Indies Guar. Tr. Co., Ltd. v. Banque Internationale a Luxembourg*, 172 A.D.2d 234, 234 [1st Dept. 1991]; *Sterling Nat. Bank as Assignee of NorVergence, Inc. v. E. Ship. Worldwide, Inc.*, 35 A.D.3d 222, 222 [1st Dept. 2006]).

The United States Supreme Court in *M/S Bremen* held that a forum selection clause should be found unenforceable if enforcement would oppose the public policy of the forum where the lawsuit is initiated (*M/S Bremen*, 407 U.S. at 15). In New York, a forum selection clause will be enforced unless a party demonstrates that enforcement of the forum selection clause would be unreasonable or unjust, or the clause is invalid because of fraud or overreaching such that a trial in the forum specified in the contract would be so inconvenient that the challenging party would be deprived of his or her day in court (*Sterling Nat. Bank as Assignee of NorVergence, Inc.*, 35 A.D.3d at 222, quoting *British W. Indies Guar. Tr. Co., Ltd.*, 172 A.D.2d

at 234). New York courts regularly find forum selection clauses to be *prima facie* valid and have a strong tendency to enforce these clauses.

Discussion

A review of the legislative history of FIFA shows that the legislative intent was to provide "strong protection for freelancers and independent contractors against being stiffed, cheated out of money that they're owed and worked hard for . . . [and] make sure that all workers can get paid on time and in full for the work that they've done" (Comments of Sponsor Council Member Brad Lander, Transcript of City Council Stated Meeting dated October 27, 2016, pp. 71-72). While Plaintiffs argue that FIFA provides a non-waivable right to bring claims in the forum convenient to the freelance worker to address a well-known tactic of forcing freelance workers to litigate their claims in far-flung jurisdictions, legislative history research did not uncover any discussion of the intent of the forum selection clause provision in the FIFA.

The plain language of FIFA's forum selection provision, "*[e]xcept as otherwise provided by law* (emphasis added), a freelance worker alleging a violation of this chapter may bring an action in any court of competent jurisdiction for damages," (Freelance Isn't Free Act [NYC Ad. Code §20-933]) undercuts Plaintiffs' argument. In New York, when a statute's language is clear and unambiguous, the court must interpret the statute by the plain meaning of its words (*Master Cars, Inc. v. Walters*, 95 N.Y.2d 395, 398 [2000]). However, while FIFA provides several relevant definitions for understanding its provisions, it does not define a court of competent jurisdiction (Freelance Isn't Free Act [NYC Ad. Code §20-927]). In *Oneida Indian Nation v. Hunt Const. Group, Inc.*, 67 A.D.3d 1345, 1347 [4th Dept. 2009], the Fourth Department defined

a court of competent jurisdiction as a court that has subject matter jurisdiction over the issue in dispute. This is the definition that this Court will employ in the instant case.

The Subcontract Agreement between ISK and Precision provided that all litigation would take place in Massachusetts, and that the parties agree and consent to the jurisdiction of Massachusetts state courts (NYSCEF Doc. No. 2 at clause 12). The forum selection clause could be found unenforceable if there was evidence that FIFA intended to prevent forum selection clauses from being enforceable against freelance workers bringing suits alleging FIFA violations, or that the forum selection clause here is unreasonable or fraudulent to the extent of depriving ISK of its day in court.

As discussed, New York State statutes and case law favor the enforcement of forum selection clauses. While the Court recognizes it would be inconvenient for Plaintiffs to bring their claims in Massachusetts, it is an adjacent state and it would not be so gravely difficult and impractical as to effectively deprive Plaintiffs of their day in court (see *Mercury W. A.G., Inc. v R.J. Reynolds Tobacco Co.*, 2004 US Dist LEXIS 3508 [SDNY Mar. 5, 2004]). The Court finds that based on New York statutes and case law, the forum selection clause in the subcontract agreement between ISK and Precision is valid. The Court also does not find that the forum selection clause is unreasonable or unjust, nor is it fraudulent to the extent of depriving Plaintiffs of their day in court.

The forum selection clause in the agreement between ISK and Precision and the provisions in FIFA are not inconsistent. While FIFA provides that a freelance worker may bring an action in any court of competent jurisdiction, it does not invalidate forum selection clauses and does not provide that a freelance worker be allowed to bring an action in the forum most convenient to such worker, as argued by Plaintiffs (NYSCEF No. 116 at 2, 3, and 5; NYSCEF

No. 117 at 2, 3, and 5. *See* §20-933). As discussed, the first clause of the jurisdiction provision of FIFA allows its application, "[e]xcept otherwise provided by law…." By agreeing to a forum selection clause that is valid and enforceable under New York statutory and common law, and that designated Massachusetts as the forum for litigation, Plaintiffs agreed bring their dispute to a court of competent jurisdiction in Massachusetts (*See* §20-933; CPLR §327(a)).

Similar to New York, Massachusetts favors the enforcement of forum selection clauses and places the burden on the plaintiff to demonstrate that enforcement would be unfair or unreasonable (*See Cambridge Biotech Corp. v. Pasteur Sanofi Diagnostics*, 433 Mass. 122, 130, 740 N.E.2d 195, 201 [2000]; *Jacobson v. Mailboxes Etc. U.S.A., Inc.*, 419 Mass. 572, 575, 646 N.E.2d 741, 743 [1995]). Using the definition from *Oneida Indian Nation*, 67 A.D.3d at 1347, as a court with subject matter jurisdiction over the case, Massachusetts is qualified as a court of competent jurisdiction. The Subcontract Agreement's choice of forum provision did not waive Plaintiffs' rights under FIFA, and therefore did not violate FIFA's terms (Freelance Isn't Free Act [NYC Ad. Code §20-935]).

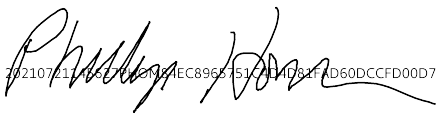
The Court finds that the forum selection clause within the Subcontract Agreement between ISK and Precision is valid and enforceable and it is ORDERED that the Mizuho Defendants' and the Precision Defendants' motions to dismiss are granted in their entirety, under CPLR § 3211(a)(1). The remaining branches of the Mizuho Defendants' and the Precision Defendants' motions to dismiss are rendered moot.

Conclusion

Based on the foregoing, the Mizuho Defendants' motion to dismiss (Sequence No. 4) is granted and the Complaint against them is dismissed in its entirety because this action was brought in the incorrect forum.

Similarly, the Precision Defendants' motion to dismiss (Sequence No. 5) is granted and the Complaint against them is dismissed in its entirety because this action was brought in the incorrect forum.

This constitutes the Decision and Order of this Court.



7/21/2021
DATE

PHILLIP HOM, J.S.C.

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