UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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GLENN DeBELLO,

Plaintiff,

- against -

VOLUMECOCOMO APPAREL, INC.; VOLUMECOCOMO APPAREL OF NEW YORK, INC., YONG AHN a/k/a ANDREW AHN; and HYOSIK CHANG a/k/a CHRIS CHANG,

Defendants.
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MEMORANDUM & ORDER

16 Civ. 257 (NRB)

NAOMI REICE BUCHWALD
UNITED STATES DISTRICT JUDGE

Plaintiff Glenn DeBello sued defendants VolumeCocomo Apparel, Inc. ("VolumeCocomo Apparel"), VolumeCocomo Apparel New York, Inc. ("VolumeCocomo New York"), Yong Ahn, a/k/a Andrew Ahn, and Hyosik Chang, a/k/a Chris Chang, asserting breach of contract and discrimination and retaliation claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq. ("Title VII"), the New York State Human Rights Law, N.Y. Exec. Law § 296 (the "NYSHRL"), and the New York City Human Rights Law, N.Y. City Admin. Code § 8-107 (the "NYCHRL"). Defendants moved to dismiss on the grounds that plaintiff's claims are subject to a contractual forum selection clause specifying the Superior Court of Los Angeles, West Judicial District, as the exclusive forum for his claims. For the reasons set forth below, defendants' motion is granted.

I. Background[1]

Defendant VolumeCocomo Apparel is a clothing manufacturer and wholesaler that specializes in women's fashion; it has offices in New York, Los Angeles, China, Korea, and Cambodia. Compl. ¶ 11. VolumeCocomo Apparel conducts business operations through its wholly-owned subsidiary, defendant VolumeCocomo New York. Id. ¶ 12. The companies share management, employees, and offices. Id. Defendants Ahn and Change are owners and senior executives of both companies. Id. ¶¶ 13, 14.

In October 2012, VolumeCocomo Apparel hired DeBello as Vice President of Product Development and Private Brands with a guaranteed annual salary of $360,000 for three years. Id. ¶ 17. DeBello's primary responsibility was to sell the company's products to major retailers to help them develop their private label businesses. Id. ¶ 18. DeBello reported directly to VolumeCocomo Apparel's Chief Operating Officer, id. ¶ 19, and worked primarily out of defendants' New York office, Decl. of Glenn DeBello in Opp. to Defs.' Mot. to Dismiss (ECF No. 20) ("DeBello Decl.") ¶ 21.[2]

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[1] Unless otherwise noted, the following allegations are taken from plaintiff's complaint filed January 13, 2016 (ECF No. 1) (the "Complaint" or "Compl."), and are assumed true for the purposes of this motion.

[2] A district court may consider the parties' affidavits and declarations when deciding a *forum non conveniens* motion. See infra; see also Transunion Corp. v. PepsiCo, Inc., 811 F.2d 127, 130 (2d Cir. 1987) ("Motions to dismiss for forum non conveniens may be decided on the basis of affidavits.").

The terms of DeBello's employment were governed by an employment agreement dated October 9, 2012 (the "Agreement"). Compl. ¶ 17. The Agreement contained a choice of law and forum selection clause providing that "Any dispute arising from the relationship between the parties to this Agreement shall be governed by and construed under and according to California law, and any action or arbitration based thereon shall be venued in the Superior Court of Los Angeles, West Judicial District." Mitchell Rudnick Aff., Ex. A (ECF No. 16-2) § 4.3.

The Agreement also contained a provision stating that "The parties have each received independent legal advice from attorneys of their own choosing with respect to the terms of this Agreement. Prior to the execution of this Agreement by each party, each party's attorneys have reviewed this Agreement at length and had the opportunity to make all desirable changes." Id. § 4.9.

According to the Complaint, defendants and their employees sexually harassed and humiliated DeBello on multiple occasions because they believed that DeBello was gay and "too feminine and did not behave like a man should." Compl. ¶ 20; see also id. ¶¶ 21-31. The alleged harassment occurred in defendants' New York office. DeBello Decl. ¶¶ 16, 21.

In February 2013, DeBello complained of the discrimination and harassment to his direct supervisor in New York. Compl. ¶ 33; DeBello Decl. ¶ 17. A month after he complained, defendants

reduced DeBello's salary by a third. Compl. ¶ 35. The following month, DeBello was fired. Id. ¶ 36.

In October 2013, DeBello filed a charge of discrimination with the United States Equal Opportunity Employment Commission (the "EEOC"). Id. ¶ 8. In October 2015, the EEOC issued DeBello a notice of right to sue. Id.

Plaintiff commenced this action on January 13, 2016, asserting a breach of contract claim and discrimination and retaliation claims under Title VII, the NYSHRL, and the NYCRHL. See ECF No. 1. On May 3, 2016, defendants moved to dismiss under Federal Rule of Civil Procedure 12(b)(3) and the doctrine of *forum non conveniens*. See ECF No. 22. Defendants argue that the action must be dismissed because plaintiff's claims are covered by the Agreement's forum selection clause and therefore may only be litigated in the Superior Court of Los Angeles, West Judicial District. See ECF No. 24.

II. Legal Standard

There is a "strong federal public policy" of enforcing forum selection clauses; thus, on a motion to dismiss based on *forum non conveniens*, a forum selection clause is "presumptively enforceable" if it (1) was reasonably communicated to the resisting party, (2) has mandatory force, and (3) covers the claims and

parties involved in the dispute. Martinez v. Bloomberg LP, 740 F.3d 211, 217-218 (2d Cir. 2014).[3]

A party may nevertheless "overcome this presumption by showing that enforcement of the forum selection clause would be unreasonable or unjust" because "(1) its incorporation was the result of fraud or overreaching; (2) the law to be applied in the selected forum is fundamentally unfair; (3) enforcement contravenes a strong public policy of the forum in which suit is brought; or (4) trial in the selected forum will be so difficult and inconvenient that the plaintiff effectively will be deprived of his day in court." Id. at 217, 227-28 (internal quotation marks omitted); Phillips v. Audio Active Ltd., 494 F.3d 378, 383-84 (2d Cir. 2007). The party opposing enforcement bears a "heavy burden" in overcoming this presumption. Martinez, 740 F.3d at 218-19.

"In deciding a motion to dismiss for *forum non conveniens*, a district court normally relies solely on the pleadings and affidavits, though it may order limited discovery." Id. at 216 (citations omitted). "Similarly, in evaluating a motion to dismiss

[3] Although defendants move on the basis of *forum non conveniens* and Federal Rule of Procedure 12(b)(3), we note that only the former is a proper grounds for dismissal here. As the Supreme Court has explained, "Rule 12(b)(3) allow[s] dismissal only when venue is 'wrong' or 'improper.' Whether venue is 'wrong' or 'improper' depends exclusively on whether the court in which the case was brought satisfies the requirements of federal venue laws, and those provisions say nothing about a forum-selection clause." Atl. Marine Const. Co. v. U.S. Dist. Court for W. Dist. of Texas, 134 S. Ct. 568, 577 (2013). "Instead, the appropriate way to enforce a forum-selection clause pointing to a state . . . forum is through the doctrine of *forum non conveniens*." Id. at 580; see also Martinez, 740 F.3d at 216.

based on a forum selection clause, a district court typically relies on pleadings and affidavits, but must conduct an evidentiary hearing to resolve disputed factual questions in favor of the defendant." Id. at 216-17 (citations omitted).

III. Application

Here, the Agreement's forum selection clause is presumptively enforceable, as neither party disputes that it was communicated to DeBello, has mandatory force, and covers the claims and parties involved in the dispute.[4] The burden therefore shifts to DeBello to overcome this presumption by showing that enforcement would be "unreasonable or unjust."

DeBello does not argue that the forum selection clause was the result of "fraud or overreaching" or that the law to be applied

[4] While neither party addresses the issue, we are satisfied that the forum selection clause covers the claims and parties involved. Although three of the defendants—VolumeCocomo New York, Ahn, and Chang—are not parties to the Agreement, they are "closely related" to VolumeCocomo Apparel, and therefore may enforce the Agreement's forum selection clause. See Magi XXI, Inc. v. Stato della Citta del Vaticano, 714 F.3d 714, 723 (2d Cir. 2013) ("[A] non-signatory to a contract . . . may enforce the forum selection clause against a signatory when the non-signatory is 'closely related' to another signatory" such that "the non-signatory's enforcement of the forum selection clause is 'foreseeable' to the signatory." (footnote omitted) (citations omitted)).

Plaintiff's discrimination claims also fall under the Agreement's forum selection clause, since the alleged discrimination "aris[es] from the relationship between the parties" to the Agreement. See, e.g., Olinick v. BMG Entm't, 138 Cal. App. 4th 1286, 1300-01, 42 Cal. Rptr. 3d 268, 279 (2006) ("In the absence of any limiting or qualifying language . . . , we conclude the forum selection clause '*encompasses all causes of action arising from or related to the Agreement, regardless of how they are characterized.*' If the parties truly intended to limit the forum selection clause . . ., they should have so specified.' (citation omitted)(alterations omitted)(quoting Nedlloyd Lines B.V. v. Superior Court, 3 Cal. 4th 459, 470, 834 P.2d 1148, 1155 (1992))); see also Martinez, 740 F.3d at 220 (holding that the law designated by parties governs whether claims fall under a forum selection clause).

in California state court would be "fundamentally unfair." Instead, DeBello argues that enforcement of the forum clause would contravene the strong public policy of litigating Title VII and New York discrimination claims in a local forum. We disagree.

As an initial matter, we do not disagree that there is a public policy preference to adjudicate discrimination claims in the forum in which the discrimination occurred. Indeed, the Second Circuit has stated that Title VII's venue provision, which authorizes suit in only certain venues, "was designed to prevent national companies with distant offices from seeking to discourage claims by forcing plaintiffs to litigate far from their homes," and "may express a broader federal policy of ensuring access to a federal forum to enforce certain statutory claims." Martinez, 740 F.3d at 228–29 (internal quotation marks omitted).[5]

However, it does not follow that such a policy *requires* adjudicating discrimination claims in the local forum, especially when the parties have agreed otherwise. Indeed, DeBello cites no

[5] Title VII's venue provision states, in relevant part:

> Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office.

42 U.S.C. § 2000e-5(f)(3).

authority from this District or the Second Circuit Court of Appeals holding that forum clauses are *per se* unenforceable if they require litigating discrimination claims in a non-local forum.

Instead, the Second Circuit's opinions in this area suggest that civil rights plaintiffs resisting enforcement of a forum selection clause must demonstrate that enforcement would undermine their role as "private attorneys general," either because the required forum would not adequately enforce civil rights, or because they would be hindered from litigating their claims in the required forum. See id. at 229 (stating that Court "would hesitate to enforce a forum selection clause if the party resisting enforcement demonstrated that the foreign forum's anti-discrimination law was insufficient to deter employers from violating the civil rights of individuals with disabilities," but finding that plaintiff "has failed to make such a showing"); Red Bull Assocs. v. Best W. Int'l, Inc., 862 F.2d 963, 966 (2d Cir. 1988) (finding plaintiffs had "adduced evidence sufficient to persuade the district court of their role as 'private attorneys general' carrying out important community civil rights imperatives by maintaining this litigation" and that the district court was "satisfied" that plaintiffs "would be unable or unwilling to pursue" the action if transferred).

DeBello has made no such showing. In entering into the Agreement, apparently with advice of counsel, DeBello agreed to

bring his claims in the Superior Court of Los Angeles and agreed that they would be governed by California law. DeBello has not argued—much less demonstrated—that California state court would be inadequate to adjudicate his claims or that California state law would be inadequate to protect his civil rights. Nor is there any reason to believe as much. At most, litigating in California state court would be inconvenient and more expensive for DeBello. Standing alone, however, those are insufficient reasons for invalidating a forum selection clause, especially when DeBello is a well-compensated professional. Cf. Martinez, 740 F.3d at 230 (noting that plaintiff "was a highly compensated senior figure at Bloomberg").

Having found that the forum selection clause is enforceable, we dismiss the action under the doctrine of *forum non conveniens*.

IV. Conclusion

For the reasons set forth above, defendants' motion to dismiss under the doctrine of *forum non conveniens* is granted. This memorandum and order resolves Docket No. 22, and the Clerk of the Court is directed to dismiss the action.

SO ORDERED

Dated: New York, New York
January 25, 2017

NAOMI REICE BUCHWALD
UNITED STATES DISTRICT JUDGE