SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

Civil Division

Central District, Stanley Mosk Courthouse, Department 24

19STCV17341 December 6, 2019
TURNER TENNEY vs FAZE CLAN INC., A DELAWARE CORPORATION 8:30 AM

Judge: Honorable Patricia D. Nieto
Judicial Assistant: M. Tran
Courtroom Assistant: G. Velasquez

CSR: Adra L. Pittman #13298
ERM: None
Deputy Sheriff: None

APPEARANCES:

For Plaintiff(s): Bryan Joel Freedman and Jesse Kaplan

For Defendant(s): Joel David Siegel , Katherine Clements, and Manny J. Caixeiro

NATURE OF PROCEEDINGS: Case Management Conference; Hearing on Motion for Forum Non Conveniens; Hearing on Motion for Protective Order

Pursuant to Government Code sections 68086, 70044, and California Rules of Court, rule 2.956, *Adra L. Pittman, certified shorthand reporter is appointed as an official Court reporter pro tempore in these proceedings, and is ordered to comply with the terms of the Court Reporter Agreement. The Order is signed and filed this date.

The case is called for hearing.

After hearing oral argument, the parties are ordered to meet and confer to draft a stipulation.

Out of the presence of the Court Reporter, the case is recalled for hearing.

The Court adopts its tentative ruling as the Order of the Court.

Defendant FaZe Clan Inc.'s motion to dismiss/stay the action for forum non conveniens is GRANTED, conditioned on their offering of a stipulation that California law would apply to the non-waivable statutory claims and the payment of an additional filing fee for the improper combination of two independent motions.

On May 20, 2019, Plaintiff Turner Tenney a.k.a. Tfue ("Plaintiff" or "Tenney") brought the instant breach of contract suit against Defendant FaZe Clan Inc. ("Defendant" or FaZe"). The operative First Amended Complaint ("FAC") alleges nine causes of action for: 1) declaratory relief; 2) violation of the Talent Agency Act ("TAA") and de novo review; 3) declaratory relief; 4) declaratory relief; 5) unfair business practices; 6) money had and received; 7) quantum meruit; 8) breach of written contract; and 9) breach of fiduciary duty.

Tenney is a prominent "streamer" and competitor in the growing competitive video game scene or "e-sports." FaZe is a e-sports entertainment company. The instant case arises from a contract dispute regarding the "Gamer Agreement" between the parties. In that contract, Tenney agreed to provide certain services to FaZe related to competitive video games, including competing at events under the FaZe name, create video content, stream his gameplay live on online video platforms, amongst other promotional services. FaZe would actively procure and negotiate sponsorship deals for Tenney, provide a salary, and distribute payments gained from any deals in accordance with the contract. Tenney asserts that the agreement was oppressively one-sided, violated the TAA, and illegally restricts his ability to pursue his trade and profession. Tenney also asserts that FaZe breached the contract by failing to distribute certain payments owed to Tenney under the contract.

On August 1, 2019, FaZe filed three motions: 1) a motion for protective orders related to various third party subpoenas; 2) a demurrer; and 3) a motion to dismiss/stay for forum non conveniens. On August 30, 2019, FaZe's forum non conveniens/demurrer was taken withdrawn due to the filing of the FAC. On Spetember 3, 2019, Tenney filed an opposition to the protective order motion. On September 9, 2019, FaZe filed a reply.

On September 30, 2019, FaZe refiled the motion to dismiss/stay for forum non conveniens and the demurrer to the second cause of action as to the FAC. On October 28, 2019, Tenney filed oppositions. On November 1, 2019, FaZe filed replies. The Court continued the motions to allow for a code-compliant meet and confer process as to the demurrer and protective order motions. On November 27, 2019, FaZe filed a supplemental declaration indicating that the parties met and conferred as to those issues.

Multiple Motions Improperly Combined

At the outset, the Court notes that this presents a motion that is two motions in one: Defendant is seeking to stay/dismiss the case pursuant to the doctrine of forum non conveniens while also demurring to the second cause of action. In the future, moving party is ordered to obtain separate hearing reservations and pay separate filing fees. Combining multiple motions under the guise of one motion with one hearing reservation manipulates the Court Reservation System and unfairly jumps ahead of other litigants. Moreover, combining motions to avoid payment of separate filing fees deprives the Court of filing fees it is otherwise entitled to collect.

Be that as it may, the Court will still exercise its discretion to hear the motions, but this order will not become effective until moving party pays an additional $60 in filing fees.

Evidentiary Objections
Plaintiff's objections nos. 1-11are OVERRULED. These objections go to the weight of the evidence rather than admissibility.

Defendant's objections to the Sarasky Declaration nos. 1-3 are OVERRULED. Defendant's objections to the Bowden Declaration nos. 1-5, 8-10 are OVERRULED; objections nos. 6-7 is SUSTAINED as to hearsay statements and lack of personal knowledge.

Request for Judicial Notice

Defendant requests that the Court take judicial notice of: 1) The Notice of Hearing dated October 28, 2019, issued by the California Labor Commissioner California Labor Commissioner in the matter of Tenney v. Faze Clan, Inc., Case No.: TAC-52704 (Ex. 1); and 2) the civil action pending in the United States District Court for the Southern District of New York entitled Faze Clan, Inc., v. Tenney, Case No. 19-cv- 7200 (ex. 2). Defendant's request is GRANTED. (Evid. Code § 452(d).) Though, the Court must note that any decisions made by the SDNY are not binding on this Court. This Court will not blindly agree with the cited decision without independent analysis applying California law and standards.

Forum Non Conveniens Standard

"Forum non conveniens is an equitable doctrine invoking the discretionary power of a court to decline to exercise the jurisdiction it has over a transitory cause of action when it believes that the action may be more appropriately and justly tried elsewhere. [Citations]." (Stangvik v. Shiley, Inc. (1991) 54 Cal.3d 744, 751.) The doctrine has been codified in Code of Civil Procedure section 410.30. "The inquiry is whether 'in the interest of substantial justice an action should be heard in a forum outside this state.' " (Animal Film, LLC v. D.E.J. Productions, Inc. (2011) 193 Cal.App.4th 466, 471.)

Where plaintiff is a California resident for purposes of forum non conveniens, there is a strong presumption in favor of plaintiff's choice of forum. (Stangvik, supra, 54 Cal.3d at 754.) A nonresident plaintiff's choice of forum is entitled to "due deference" under all circumstances, but not a strong presumption of appropriateness. (National Football League v. Fireman's Fund Ins. Co. (2013) 216 Cal.App.4th 902, 929-930.)

Discussion

In a contract dispute where the contract contains a forum selection clause "a threshold question in a forum non conveniens motion is whether a forum selection clause is mandatory or permissive." (Animal Film, Inc., supra, 193 Cal.App.4th at 471; Berg v. MTC Electronics Technologies Co., Ltd. (1998) 61 Cal.App.4th 349, 359.) The issue is one of contract interpretation. (Richtek USA, Inc. v. uPI Semiconductor Corporation (2015) 242 Cal.App.4th 651, 661.) Because California favors enforcement of mandatory forum selection clauses they will be given effect absent a showing by the party resisting the motion, usually the plaintiff, that enforcement of such clauses would be unreasonable. (Quanta Computer Inc. v. Japan Communications Inc. (2018) 21 Cal.App.5th 438, 445.) "The factors that apply generally to a forum non conveniens motion do not control in a case involving a mandatory forum selection clause. Where there is a mandatory forum selection clause, 'the test is simply whether application of the clause is unfair or unreasonable, and the clause is usually given effect. Claims that the previously chosen forum is unfair or inconvenient are generally rejected. A court will usually honor a mandatory forum selection clause without extensive analysis of factors relating to convenience." (Ibid. [citations and internal quotation marks omitted].)

Here, the Gamer Agreement's forum selection clause is unquestionably mandatory. Specifically, the Gamer Agreement states: "The Parties submit exclusively to the state or federal courts located in New York, NY for any claim hereunder and each Party consents to the jurisdiction thereof." (Caixeiro Decl., Ex. B.) The use of the phrase exclusive is unequivocal and evinces the parties' intent that the forum section clause be mandatory. (See Cal–State Business Products & Services, Inc. v. Ricoh (1993) 12 Cal.App.4th 1666, 1672, fn. 4 [mandatory clause found where the terms stated "any appropriate state or federal district court located in the Borough of Manhattan, New York City, New York shall have exclusive jurisdiction over any case of controversy arising under or in connection with this Agreement..."); cf. Animal Film, Inc., supra, 193 Cal.App.4th at 470 [permissive clause found where the terms stated "[t]he parties hereto submit and consent to the jurisdiction of the courts in [designated forum] in any action brought to enforce or otherwise relating to this agreement"].) Plaintiff neither disputes the nature of the clause, nor the fact that it embraces the FAC. Thus, there is a voluntary forum-selection agreement between the parties as to the FAC.

California Statutory Rights

Typically, such a finding would result in Plaintiff's heavy burden to show that enforcement would be unreasonable or unfair. (Verdugo v. Alliantgroup, L.P. (2015) 237 Cal.App.4th 141, 147.) "Mere inconvenience or additional expense is not the test of unreasonableness for a

mandatory forum selection clause. A clause is reasonable if it has a logical connection with at least one of the parties or their transaction." (Ibid., citations and quotation marks omitted.) Whether Plaintiff would meet this burden will be discussed further below. However, "California courts will refuse to defer to the selected forum if to do so would substantially diminish the rights of California residents in a way that violates our state's public policy." (Ibid.) In this instance, Defendant bears the burden to show litigating the claims in the contractually-designated forum " 'will not diminish in any way the substantive rights afforded ... under California law.' " (Id. at 148; quoting Wimsatt v. Beverly Hills Weight etc. Internat., Inc. (1995) 32 Cal.App.4th 1511, 1520–1524; see America Online, Inc. v. Superior Court (2001) 90 Cal.App.4th 1, 11.)

Plaintiff asserts that certain causes of action are based on such rights: the first/second causes of action regarding violations of the TAA; and 2) the fourth cause of action for declaratory relief requesting that the Court determine the agreement illegally restrained Tenney's rights in violation of Bus. & Prof. Code section 16600. Thus, the Court must determine whether these statutes involve un-waivable rights.

The TAA is a remedial statute designed to protect artists seeking employment. (See Buchwald v. Superior Court (1967) 25 7 Cal.App.2d 347, 350; Marathon Entm't, Inc. v. Blasi (2008) 42 Cal.4th 974, 984-986.) The TAA requires those acting as a talent agency by soliciting or procuring artistic employment to obtain a talent agency license. (See Labor Code § 1700.5.) The Labor Commissioner and Superior Court may deem the entire artist's agreement void ab initio when there are violations of Lab. Code section 1700.5. (See Marathon, supra, 42 Cal.4th at 990-996.) Plaintiff asserts that the TAA is unwaivable because the Labor Code section 1700.44(a) imposes "exclusive" jurisdiction over controversies colorably arising under the TAA. (See Styne v. Stevens (2001) 26 Cal.4th 42, 54-56.) The California Superior Court also has exclusive (though not original) jurisdiction over any subsequent proceedings involving the TAA, including de novo review. (See Lab. Code § 1700.44(a).) Such jurisdictional requirements are "mandatory". (See Buchwald, supra, 254 Cal.App.2d at 358.) The reference of disputes involving the act to the Commissioner is mandatory and jurisdictional. (REO Broad. Consultants v. Martin (1999) 69 Cal.App.4th 489, 495.)

The Court finds that the TAA is an unwaivable right. Buchwald instructs "[n]or may one waive the benefits of a statute established for a public reason (Civ. Code, § 3513), as were the Labor Code provisions here" in reference to the TAA. (Buchwald, supra, 254 Cal.App.2d at 359.) Here, the TAA was created for a public purpose, and Plaintiff therefore cannot waive these rights through the forum selection clause. Tenney was a California while performing under the contract for several months. The public purpose of the TAA would be defeated if allowed to be waived by

individuals.

Defendant asserts that there is authority showing that TAA claims may be compelled to arbitration, and therefore the claim should be waivable. However, Defendant's cited authority is distinguishable in the context of arbitrations brought under the auspices of the Federal Arbitration Act ("FAA"). (Preston v. Ferrer (2008) 552 U.S. 346, 359) This is because, as the Ferrer court noted, "[w]hen parties agree to arbitrate all questions arising under a contract, the FAA supersedes state laws lodging primary jurisdiction in another forum, whether judicial or administrative." (Ibid.) Defendant cites no law which would preempt the TAA, such as the FAA, in this instance.

As to section 16600, Plaintiff suggests that these rights are unwaivable. Indeed, "Business and Professions Code section 16600 was adopted for a public reason… [a party] could not by agreement waive the benefit afforded under California law." (Weber, Lipshie & Co. v. Christian (1997) 52 Cal.App.4th 645, 659 [citing Civ. Code section 3513].)

Defendant is required to show that New York court would provide the same or greater rights than California, or the foreign forum will apply California law on the claims at issue. (See Verdugo, supra, 237 Cal.App.4th at 157-159.) Here, there is a choice of law clause present which precludes applying California law. Such a choice of law clause would diminish Tenney's California statutory rights discusses above, since Defendant cites no New York law which would provide equal or greater protections.

Defendant suggests that the New York could might apply California law anyways through a traditional choice of law analysis. However, Defendant does not satisfy its burden with such speculation. This argument is almost the same presented by the defendant in Verdugo. (See Verdugo, supra, 237 Cal.App.4th at 158 [holding that had defendant stipulated to have Texas courts apply California law to the plaintiff's claims it would have ensured that plaintiff's substantive rights would not be lost if the forum selection clause were enforced and would have eliminated uncertainty as to which law applied].) The court reasoned that the only guarantee that the New York court would apply California law is a stipulation to that effect. Here, Defendant has that option and may offer that. If Defendant does, then the Court would be inclined to grant the motion. If Defendant cannot, then the Court cannot grant the motion for public policies reasons.

Plaintiff claims that the New York court could not possibly apply California law in this instance. Plaintiff's cited authority that an out of state court could not have jurisdiction to hear the suit

includes a Labor Commission decision. (See Plaintiff's Compendium of Labor Commissioner Authorities ("CLCA") Ex. 1, styled Flowers v. From the Future, LLC, TAC 10-06.) This merely held that the Labor Commission had authority to hear the petition despite the Nevada law and venue provisions. The decision makes no comment as to whether an out of state court could apply California law to determine TAA violations or de novo review. Plaintiffs State law authorities likewise make no such determination. Plaintiff argues that these authorities hold that the Superior Court's jurisdiction over TAA suits is exclusive, mandatory, and jurisdictional. However, every reference Plaintiff makes only cites to the requirement that a determination by the Labor Commissioner is mandatory and jurisdictional. (See Greenfield v. Superior Court (2003) 106 Cal.App.4th 743, 747-751; see also REO Broadcasting Consultants, supra, 69 Cal.App.4th at 495.) The Court sees no reason why a Federal Court would be unable to apply California law, even if the Labor Commission has exclusive original jurisdiction over petitions made there, and a petition is a perquisite to suit. Notably, New York's federal courts have adjudicated claims arising under the California statutes, including the Business & Professions Code. (See, e.g., Fink v. Time Warner Cable (S.D.N.Y. 2011) 810 F.Supp.2d 633 [adjudicating claims under Cal. Bus. & Prof. Code § 17500 and Cal. Civ. Code § 1770].)

Assuming that Defendant would stipulate to the application of California law, the Court would still be required to consider the reasonableness of New York as a forum. To this end, Plaintiff fails to meet his heavy burden to demonstrate that enforcement would be unreasonable.

Reasonableness of the Forum

Establishing the unreasonableness of enforcing the forum selection clause is a heavy burden, but not insurmountable. (Aral v. EarthLink, Inc. (2005) 134 Cal.App.4th 544, 561, abrogated on other grounds by AT&T Mobility LLC v. Concepcion (2011) 563 U.S. 333.) The burden can be met only if the party opposing the clause's enforcement can establish that: (1) the party lacked notice of the clause; (2) the clause is unreasonable; or (3) the clause violates public policy. (See Carnival Cruise Lines, Inc. v. Sup. Ct. (1991) 234 Cal.App.3d 1019, 1027; Cal-State Bus. Prods & Servs., Inc., supra, 12 Cal.App.4th at 1679-1680.) A forum selection clause is reasonable as long as the designated forum "ha[s] some rational basis in light of the facts underlying the transaction." (CQL Original Products, Inc., supra, 39 Cal.App.4th at 1354.) Where a plaintiff fails to meet the burden, the court may either dismiss the action in its entirety or stay the action in favor of litigation in the contractually-agreed forum. (Brg v. MTC Elecs. Techs (1998) 61 Cal.App.4th 349, 356.)

To illustrate, in Cal-State, the plaintiff argued that there was a lack of "nexus" between the

chosen forum of New York and the location where the parties lived or where the contract was executed. (Id. at 1681-82.) However, the Court held that "the choice of forum need only have a 'reasonable' basis even if it is unrelated to the domiciles or transactions involved." (Id. at 1682.) The Court further stated that although the defendant is not domiciled in New York, New York "is a major commercial center with propinquity to [defendant's] headquarters" and "we find it reasonable for [defendant] to wish to make use of the New York City courts which would have (at least institutionally) a great deal of expertise in commercial litigation." (Ibid.) The parties in this case chose New York law and venue for similar reasons. Therefore, as the Court stated in Cal-State, "there is nothing irrational about the forum selected by the contract which would defeat its enforcement." (Ibid.)

Here, Plaintiff only offers evidence attempting to contradict why New York is not the logical forum. Plaintiff argues that the parties have no logical connection to New York. For example, Defendant's principal place of business is in Los Angeles. (Bowden Decl., ¶¶ 3-4; Kaplan Decl., Ex. 3-4 and 8-10.) "Almost" all of Defendant's employees are in Los Angeles. (Bower Decl., ¶ 10.) The contract was negotiated in Los Angeles and would be partially performed in Los Angeles. (Tenney Decl., ¶¶ 2-4.) FaZe clan apparently convinced Tenney to move to Los Angeles to live at a "pro house" that they owned, with much fanfare. (Id. ¶¶ 5-11, Ex. 1; Bower Decl., ¶ 12.) Further, Tenney only spoke with Los Angeles associated FaZe representatives and performed a number of videos in Los Angeles. (Tenney Decl., ¶ 13.)

Plaintiff also tries to minimize Defendant's contacts with New York. For example, Plaintiff attacks Defendant's purported offices in New York, asserting that they were sham offices that were not even owned by Defendant and had none of Defendant's employees. Plaintiff asserts that a former employee of FaZe, Samantha Sarasky, dispels any notion that Defendant had New York offices. She declares that in March 2018, non-party Hubrick Limited ("Hubrick"), not FaZe, leased a small shared workspace from WeWork located at 79 Madison Avenue (the "Shared Space"). The Shared Space was not leased or occupied by FaZe Clan. (Sarasky Decl., ¶¶ 3-4.) Defendant had no employees there, as they all worked for Hubrick. (Id. ¶ 5.) However, Plaintiff does concede that the shared space was used to create videos for FaZe. Plaintiff notes that a purported 2014-2015 headquarters in Plainview, New York, could not have been a headquarters for Defendant since it was incorporated in 2016. (Kaplan Decl., ¶ 4, Ex. 3-4.)

In effect, Plaintiff only argues that California the better-connected forum to the transaction. However, this is not the type of evidence courts have required to defeat a forum selection clause. As noted, the normal forum non conveniens factors do not apply. There need simply be a reasonable basis for the chosen forum. It need not be related to the parties' domicile or their

dispute, but the only the transaction. (See M/S Bremen v. Zapata Off-Shore Co., supra, 407 US at 17; Cal-State Business Products & Services, Inc., supra, 12 Cal.App.4th at 1682.)

Here, Plaintiff fails to negate several of the logical reasons that New York was selected as the forum, instead focusing on the connections with California. Plaintiff does not suggest that he would be "robbed of his day in court" if the forum selection clause were enforced as to his contract-based claims. It is undisputed that when the Agreement was signed, Defendant was a Delaware corporation that was registered to do business in New York. (Anderson Decl. ¶ 7.) Defendant had a history of operating from New York. (Id. ¶¶ 7-8.) Defendant's European gamers generally preferred New York as a dispute resolution location as compared to other, further United States destinations. (Ibid.) Importantly, Defendant's counsel at the time of the signing of the Agreement was based out of New York. (Ibid.) This may provide a sufficient reason alone; a party may wish to have disputes arising out of a business contract tried in a convenient forum for their counsel. FaZe Clan has had, and continues to have, one or more full-time employees working in New York. (Ibid.; see Bowden Decl., ¶ 5.) It cannot be disputed that the agreement would be performed nation-wide, potentially requiring national and international travel to gaming competitions, including competitions in New York. (Ibid.) The 2019 Fortnite World Cup, while not planned at the time of the agreement, provides an example of this. Based on these facts, the Court cannot state that the forum selection clause was not reasonable. Whether another forum is better suited to hear the case is irrelevant where there is an enforceable forum selection clause.

Accordingly, Defendant's motion is GRANTED, conditioned on their offering of a stipulation that California law would apply to the non-waivable statutory claims. (See Verdugo, supra, 237 Cal.App.4th at 158.) The case is STAYED pending resolution of any subsequent suit. Accordingly, the motion for protective orders and demurrer are also stayed and not addressed at this time.

Stipulation is signed and filed this date.

The Court hereby stays the case in its entirety.

Status Conference re Stay is scheduled for 07/06/20 at 08:30 AM in Department 24 at Stanley Mosk Courthouse.

Notice is waived.